

RESTITUTION FOR CONSUMERS UNDER THE FEDERAL TRADE COMMISSION ACT: GOOD INTENTIONS OR CONGRESSIONAL INTENTIONS?

PETER C. WARD*

TABLE OF CONTENTS

Introduction	1140
I. Authority of the FTC to Order Restitution Pursuant to Its "Cease and Desist" Power	1144
A. The Legislative History of the FTC's Cease and Desist Authority	1144
1. Section 5 remedial power as enacted in 1914 ...	1145
2. The Wheeler-Lea Amendments of 1938	1157
B. The <i>Curtis</i> Case: The FTC's Expansive Self- Interpretation of the "Cease and Desist" Authority	1162
1. Restitution to restore competitive status quo ...	1166
2. Restitution to end a continuing violation	1167
C. The <i>Heater</i> Case: Judicial Rejection of the FTC's Interpretation of the "Cease and Desist" Power	1169
1. Proceedings Before the Federal Trade Commission	1169
2. The appeal to the Ninth Circuit	1172
II. Legislative Approaches to Consumer Redress	1174
A. The Trans-Alaska Pipeline Act Amendments: Section 13(b) Injunctive Relief	1174
B. The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act: Congress Provides an Express Means of Consumer Redress	1179
III. The Judiciary Takes Over	1184
A. Judicial Construction of the Section 13(b)	

* Associate Professor of Business Law, Else School of Management, Millsaps College, Jackson, Mississippi; A.B., Amherst College; J.D., University of Pennsylvania.

Preliminary Injunction Authority in Consumer Protection Cases	1184
B. Judicial Construction of the Section 13(b) Permanent Injunction Authority: A Judicial Bypass of Section 19	1189
C. Reconciling Section 13(b) Permanent Injunctions with Section 19 Consumer Redress	1195
Conclusion	1197

INTRODUCTION

In June 1989, the Federal Trade Commission (FTC) filed an action in federal court seeking injunctive relief against Magui Publishers, Inc., a business that since 1982 had been selling to retail art dealers etchings and lithographs attributed to Salvador Dali.¹ The FTC alleged that Magui was falsely representing to purchasers that Dali had approved and supervised the preparation of the prints, that Dali had signed each print, that the prints were scarce, that the etchings were hand-produced from an 18th century press, and that the Dali works were valuable collectibles likely to appreciate in value.² The trial judge found these allegations of deceptive sales practices persuasive and ruled that these sales practices were unfair or deceptive.³ The judge, therefore, enjoined the actions under the Federal Trade Commission Act ("FTC Act").⁴ In addition, the court awarded restitution in the amount of \$1.96 million.⁵ The number of Dali prints the defendants sold over the seven-year period was multiplied by the mean wholesale price of each print. From that figure, the cost of production was subtracted to arrive at Magui's unjust enrichment from the scheme.⁶

Is this an example of FTC vigor in pursuing its mandate to protect the public from unfair or deceptive selling practices? Certainly. It is with reluctance, therefore, overcome only by concern for paramount

1. *FTC v. Magui Publishers, Inc.*, Civ. No. 89-3818 RSWL (GX), 1990 U.S. Dist. LEXIS 17005 (C.D. Cal. Apr. 23, 1990) (filed June 1989).

2. *FTC v. Magui Publishers, Inc.*, 1991-1 Trade Cas. (CCH) ¶ 69,425, at 65,717-29 (C.D. Cal. 1991) (setting forth FTC's Proposed Findings of Fact and Conclusions of Law).

3. *FTC v. Magui Publishers, Inc.*, 1991-1 Trade Cas. (CCH) ¶ 69,391, at 65,572-75 (C.D. Cal. 1991) (Final Judgment and Permanent Injunction).

4. *Id.* (citing Federal Trade Commission Act, 15 U.S.C. § 45(a) (1988)).

5. *Id.* at 65,512. The FTC must distribute the fund proceeds to compensate purchasers of Magui Dali art works who file a claim of injury.

6. *FTC v. Magui Publishers, Inc.*, 1991-1 Trade Cas. (CCH) ¶ 69,425, at 65,726 (C.D. Cal. 1991) (FTC's Proposed Findings of Fact and Conclusions of Law). In addition to prohibiting the defendant from misrepresenting the art works, the FTC required Magui to disclose to all potential purchasers that the prints only "interpret" Dali's work and are not "by" Dali. *Id.*

constitutional principles, that this Article criticizes the *Magui* award and the many others like it that the FTC has obtained through the courts and consent settlements. The siren song of consumer welfare has led a well-intentioned FTC and a compliant judiciary to disregard legislative intent in order to achieve consumer redress according to a scheme more favorable to injured consumers than Congress contemplated. In the *Magui* case, for example, if the court had followed the congressional intent of applying a three-year statute of limitations for consumer redress, restitution would have been limited to sales occurring after June 1986 rather than to all sales from the inception of the business in 1982.⁷

In 1914, Congress passed the FTC Act in response to widespread concern about the growth and behavior of monopolies and cartels.⁸ As originally enacted in 1914, the FTC Act protected the marketplace by prohibiting "unfair methods of competition."⁹ In 1938, Congress amended the FTC Act to prohibit "unfair or deceptive acts or practices" also.¹⁰ With that amendment, the consumer, along with business competition, became the concern of the FTC. Under the FTC Act, when the FTC determines that a company has violated the prohibitions against unfair methods of competition or unfair or deceptive acts or practices, it "shall issue . . . an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice."¹¹

Since its enactment in 1914, and especially after the "consumer revolution" of the 1960s, commentators have criticized the cease and desist remedy as an inadequate means of dealing with unfair or deceptive conduct targeted at consumers.¹² Entry of a cease and

7. Defendant *Magui Publishers, Inc.*, was incorporated in California in 1983. *Magui* was controlled by Pierre Marcand, a French citizen, who was also the principal in two overseas corporations involved in the same business, one of which was incorporated in France in 1981. *Magui Publishers*, 1991-1 Trade Cas. (CCH) ¶ 69,425, at 65,718. These two overseas corporations sold prints in the United States before *Magui Publishers, Inc.* incorporated in this country. *Id.* at 65,718-19.

8. See Woodrow Wilson, Address Before a Joint Session of Congress on Additional Legislation for the Control of Trusts and Monopolies (Jan. 20, 1914), H.R. Doc. No. 625, 63d Cong., 2d Sess. 3 (1914), reprinted in 5 EARL W. KINTNER, LEGISLATIVE HISTORY OF THE FEDERAL ANTI-TRUST LAWS AND RELATED STATUTES 3746-47 (1982) [hereinafter *Wilson Address*] (explaining need to create "program" to control private monopoly).

9. Federal Trade Commission Act, ch. 311, § 5(a), 38 Stat. 717, 719 (1914) (codified as amended at 15 U.S.C. § 45(a) (1988)).

10. Wheeler-Lea Act of 1938, ch. 49, Pub. L. No. 75-447, 52 Stat. 111, 111 (1938) (amending Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914)) ("Unfair methods of competition in or affecting commerce, and unfair deceptive acts or practices in or affecting commerce are hereby declared unlawful.").

11. Federal Trade Commission Act, § 5(b), 15 U.S.C. § 45(b) (1988).

12. See EDWARD F. COX ET AL., THE NADER REPORT ON THE FEDERAL TRADE COMMISSION

desist order sometimes requires years of litigation, during which the prohibited activity continues and consumers continue to sustain injury. Additionally, critics argue that there is little deterrent value in potential FTC action when there is a prospect of engaging in fraudulent conduct with no greater consequence than receiving a reprimand and an instruction to stop.¹³ Over the past twenty years, the FTC, Congress, and the courts have attempted to enhance the FTC's remedial authority. The FTC and the courts, however, have created rights for consumers that exceed what Congress, either rightly or wrongly, chose to grant.

In 1971, the FTC for the first time began asserting that its fifty-seven year old authority to issue cease and desist orders included the power to order restitution to victims of unfair or deceptive practices.¹⁴ The only appellate court to consider this position, however, rejected it.¹⁵ In 1973, Congress sought to address weakness in the FTC's ability to accomplish effective and expeditious law enforcement by adding section 13(b) to the FTC Act. Section 13(b) gives the FTC authority to petition federal district courts for preliminary injunctions to halt conduct allegedly violating section 5 of the FTC Act pending administrative determination of the conduct's legality.¹⁶ Section 13(b) also authorizes courts to grant permanent injunctions in "proper cases."¹⁷ In 1975, Congress added section 19 to the FTC Act. That section enables the FTC to obtain restitution from the courts for injured consumers if qualifying criteria, such as proof of intent and a statute of limitations, are met.¹⁸

66-73 (1969) [hereinafter THE NADER REPORT] (describing cease and desist remedy as inadequate and criticizing FTC enforcement as inconsistent and haphazard); REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 62-64 (1969), reprinted in 1 J. REPRINTS FOR ANTITRUST LAW AND ECONOMICS 885, 952-54 (1969) (addressing inadequacy of then-existing sanctions for FTC Act violations).

13. See THE NADER REPORT, *supra* note 12, at 72-73 (estimating four years as average duration of investigation and noting that some extend more than twenty years). The authors note that alleged violators exhibit little fear of potential sanctions, and may continue deceptive practices until an FTC order is entered. *Id.* at 73.

14. See *Curtis Publishing Co.*, 78 F.T.C. 1472, 1512-18 (1971) (noting that while use not warranted in case at bar, FTC does have powers beyond "cease and desist"). The FTC's position was endorsed in substantial part in John A. Seibert, Jr., *Obtaining Monetary Redress for Consumers Through Action by the Federal Trade Commission*, 57 MINN. L. REV. 225, 227 (1972) (stating that FTC may require payment of restitution in certain circumstances).

15. *Heater v. FTC*, 503 F.2d 321, 322-27 (9th Cir. 1974) (holding that requiring violator of FTC Act to pay restitution exceeds powers Congress gave to FTC).

16. Federal Trade Commission Act, § 13(b), tit. IV, § 408(f), Pub. L. No. 93-153, 87 Stat. 576, 592 (1973) (codified as amended at 15 U.S.C. § 53(b) (1988)) (allowing FTC to obtain preliminary injunctions when it believes FTC Act will be violated and when it is in public interest).

17. *Id.* (requiring "proper proof" be made before permanent injunction is granted).

18. Federal Trade Commission Act, § 19, tit. II, § 206(a), Pub. L. No. 93-637, 88 Stat. 2183, 2201 (1975) (codified as amended at 15 U.S.C. § 57b (1988)).

Notwithstanding these additional statutory remedies, judicial opinions in the 1980s created a less burdensome and more expansive avenue for consumer redress. The courts construed the FTC's power to obtain preliminary and permanent injunctions under section 13(b) to include ancillary equitable relief such as rescission and restitution.¹⁹ Consequently, the FTC has ignored section 19's statute of limitations and proof of intent restrictions, instead seeking injunctions and restitutionary relief under the broad equitable powers inappropriately found by the courts in section 13(b).²⁰

The American constitutional system mandates a separation of powers and roles among the branches of the government. Court decisions that allow the FTC to circumvent statutory procedures for obtaining consumer redress under section 19 are offensive to the constitutional separation of legislative and judicial authority, despite the public interest the courts purport to protect.²¹ If the intent and statute of limitations requirements for consumer redress in section 19 are unduly restrictive, the solution lies with Congress, not with the courts or the FTC.²² Until such a legislative change, courts

19. See, e.g., *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314-16 (8th Cir. 1991) (upholding FTC's grant of monetary equivalent of rescission for victimized consumers); *FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1088 (9th Cir. 1985) (finding that FTC has authority to exercise discretionary equitable powers to order rescission and restitution); *FTC v. Oil & Gas Corp.*, 748 F.2d 1431, 1432 (11th Cir. 1984) (upholding FTC power to grant ancillary equitable relief including freezing assets and appointing receiver); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1109-14 (9th Cir. 1982) (affirming FTC power to freeze assets and to order permanent injunction and "any ancillary relief necessary to accomplish complete justice. . .").

20. See Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, App. B (Apr. 7, 1989), reprinted in Trade Reg. Rep. (CCH) No. 46 (extra ed. Apr. 13, 1989) and Trade Reg. Rep. (CCH) ¶ 50,017 (May 9, 1989) (summary form) (emphasizing effective use of FTC's section 13(b) injunctive power).

21. See *supra* note 19 and accompanying text (identifying cases in which court allowed FTC to sidestep statutory procedures for obtaining consumer redress under section 19 by petitioning for exercise of unconstrained equitable discretion under section 13(b)).

22. It is too facile to argue that judicial activism in statutory interpretation is harmless because Congress can always undo a judicial interpretation. See ROBERT H. BORK, *THE TEMPTING OF AMERICA* 102 (1990) ("The Court's alteration of the law becomes permanent."). The legislative process is a cumbersome affair at best. Except for highly visible decisions that hit a currently hot political nerve, legislators usually will not go back and fine-tune a statute distorted by judicial emendations. *Id.* The losers on the issue in Congress, whose views prevail in the courts, will have no disposition to return to negotiations. *Id.* That leaves the winners in Congress, whose views ultimately lose in the courts, to mount a campaign on an issue that, standing alone, may not attract sufficient support to propel the correction all the way through the legislative labyrinth. Even if such a campaign is begun, the Constitution neither envisages nor encourages a legislative process where the judiciary becomes a player in the negotiations, reversing burdens of passage if it agrees with the losers in the congressional negotiations preceding initial passage of the legislation. The ability of Congress to overturn a judicial interpretation of statutory language should not be viewed as an invitation for judges to ignore or give short shrift to apparent choices (including decisions to do nothing) of Congress. *But cf.* Abner T. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, 386 ("It gives me some solace to know that even if I am wrong, Congress is there to correct me.").

should limit their exercise of equitable grants of restitution under section 13(b) to those cases in which the FTC meets the criteria for obtaining such relief under section 19.

I. AUTHORITY OF THE FTC TO ORDER RESTITUTION PURSUANT TO ITS "CEASE AND DESIST" POWER

Whether the FTC's section 5 cease and desist power includes the power to order restitution might seem moot based on the Ninth Circuit's 1974 decision in *Heater v. FTC*.²³ However, the FTC did not agree with the Ninth Circuit's limitation of its cease and desist authority and continued to assert that restitution was inherent in its cease and desist power.²⁴ If, as the Commission asserts, Congress gave the FTC restitutionary power in its enabling act, it is of small consequence that such power is made explicit through construction of later amendments to the FTC Act. In the absence of such a grant in 1914, however, the power of the FTC to order restitutionary relief or obtain it from the courts must be determined from later legislation, with due respect for congressional intent. Thus, whether a power to order restitution is implicit in the cease and desist authority of the FTC's enabling act is of more than academic interest.

A. The Legislative History of the FTC's Cease and Desist Authority

Congress wrote the FTC's cease and desist remedial authority into the FTC's enabling act at a time when the Act's only prohibition was against "unfair methods of competition."²⁵ The FTC, however, has asserted its own restitutionary power primarily for remedying "unfair or deceptive acts or practices," a prohibition added to the FTC Act in 1938 by the Wheeler-Lea Act.²⁶ The following consideration of legislative history looks first at the FTC Act as originally enacted in 1914 and concludes that the intended scope of the cease and desist authority did not include a restitutionary role for the

23. See *Heater v. FTC*, 503 F.2d 321, 326 (9th Cir. 1974) (concluding that legislative history clearly reflects intent not to empower FTC with right to order restitution).

24. See *Holiday Magic, Inc.*, 84 F.T.C. 748, 1045 n.11 (1974) (stating intention to appeal *Heater* decision, asserting that FTC has authority to require restitution of funds obtained in violation of FTC Act).

25. Federal Trade Commission Act, § 5(a), 15 U.S.C. § 45(a) (1988) (originally enacted as Act of Sept. 26, 1914, ch. 311, 38 Stat. 717) (limiting violation to "unfair methods of competition").

26. Wheeler-Lea Act of 1938, ch. 49, 52 Stat. 111 (codified as amended at 15 U.S.C. § 45(a) (1988)) (expanding prohibition to also include "unfair or deceptive acts or practices"); see *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 384 (1965) (affirming FTC cease and desist order against defendant for deceptive advertising associated with shaving product under Wheeler-Lea amendment); *Pep Boys-Manny, Moe, & Jack, Inc. v. FTC*, 122 F.2d 158, 161 (3d Cir. 1941) (upholding FTC determination that defendant engaged in deceptive act or practice under Wheeler-Lea amendment).

FTC. Then, an examination of the legislative history of the 1938 Wheeler-Lea Act amendments confirms that in enacting those consumer-oriented amendments, Congress did not expressly or implicitly broaden the FTC's remedial power.²⁷ Consequently, Congress did not grant the FTC remedial authority in either piece of legislation that coincides with its assertion that it has inherent power to order restitutionary relief pursuant to its cease and desist power.²⁸

1. *Section 5 remedial power as enacted in 1914*

A literal reading of section 5 of the FTC Act empowering the FTC to order violators to "cease and desist" does not suggest a congressional grant of authority to seek restitution for injured consumers.²⁹ Looking behind the FTC Act's language to examine its legislative

27. See 6 EARL W. KINTNER, *THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAW AND RELATED STATUTES* 4838-4935 (1982-83) (setting forth legislative history of Wheeler-Lea Act of 1938). For example, the Senate Commerce Committee, in reporting to the full Senate on the proposed bill, emphasized that the purpose of the amendment was solely to extend protection to consumers and noted that while the amendment must not weaken the Act's enforcement power, it also must not impose any greater hardship on commercial businesses or industries. REPORT OF THE SENATE COMMITTEE ON COMMERCE, S. REP. NO. 91, 75th Cong., 1st Sess. 5 (1937).

28. The use of legislative history in statutory construction is a subject of considerable current debate. See Michael D. Sherman, *The Use of Legislative History: A Debate Between Justice Scalia and Judge Breyer*, 16 A.B.A. Admin. L. News, Summer 1991, at 1 [hereinafter *Debate*] (discussing different positions regarding use of legislative history); *Conference on Statutory Interpretation*, 1987 DUKE L.J. 361, 361-68 [hereinafter *Conference*] (setting forth discussion between Judge Kenneth W. Starr and Judge Abner J. Mikva regarding role of legislative history in judicial interpretation). The issue revolves around the extent to which a judge should look to legislative history to determine congressional intent when a statute is either silent or ambiguous on a subject. One side of the debate is reluctant to move from the language of the statute itself because of skepticism that most documents that make up a legislative history reflect Congress' intent as a whole. See *Debate, supra*, at 13-14 (comments of Justice Scalia); *Conference, supra*, at 371-79 (comments of Judge Starr). The other side welcomes the assistance of legislative materials to clarify ambiguity. See *Debate, supra*, at 13-14 (comments of Judge Breyer); *Conference, supra*, at 380-86 (comments of Judge Mikva). Those who argue against the use of legislative history do so to discourage unelected judges from expanding statutory coverage beyond the language of the elected legislators. See *Conference, supra*, at 376 (comments of Judge Starr). This Article advocates the use of legislative history to support the ordinary meaning of the statutory language, and condemns attempts to go beyond that language to achieve a more desirable solution to the problem than that contained in the statutory text. The arguments against using legislative history to find congressional intent should not preclude its use to confirm the intent that emerges from the face of the statute. The legislative history of the Federal Trade Commission Act and its amendments is compiled in 5-7 EARL W. KINTNER, *THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES* (1982-1983).

29. See *Heater v. FTC*, 503 F.2d 321, 323 (9th Cir. 1974) (interpreting Federal Trade Commission Act as precluding FTC authority to compel restitution); *Curtis Publishing Co.*, 78 F.T.C. 1472, 1512 (1971) (finding FTC remedial authority is broader "than a literal reading of the statutory language would indicate"); see also Seibert, *supra* note 14, at 230 (concluding that FTC flexibility in determining what constitutes violation of Act appears, "at least at first blush," to be broader than its authority to remedy violations); cf. *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296, 311 (1963) (holding that Civil Aeronautics Board does not have power to award damages under its "cease and desist" authority).

history does not produce a different conclusion.³⁰

The FTC Act began as part of a package of antitrust legislation that President Wilson proposed in a speech to Congress following the presidential campaign of 1912.³¹ Congress separated Wilson's proposal for a trade commission from his other proposals, which later became the Clayton Act provisions, although Congress considered both at approximately the same time.³² The commission, as originally envisioned by President Wilson and considered by the House, would have been an administrative agency without teeth.³³ President Wilson spoke of an "interstate trade commission" that would serve "as an indispensable instrument of information and publicity."³⁴ The bill's sponsor in the House referred to the new commission's role as exposing industrial evils to "pitiless publicity."³⁵ A Republican representative commented that "one of the

30. Professor Sebert's conclusion that "the legislative history concerning the scope of the FTC's cease and desist power is at best sketchy and inconclusive" is erroneous. See Sebert, *supra* note 14, at 230. His conclusion references Professor Kauper's statement that "there was little debate over the enforcement provisions themselves." *Id.*; see Thomas E. Kauper, *Cease and Desist: The History, Effect and Scope of Clayton Act Orders of the Federal Trade Commission*, 66 MICH. L. REV. 1095, 1102 (1968) (describing legislative history of cease and desist provision of Federal Trade Commission Act). Kauper, however, overstates his point. The bill's supporters accepted the relatively weak enforcement provisions as adequate on the whole. The bill's opponents, on the other hand, gave the enforcement provisions little attention, instead choosing to concentrate their attack on the newly created prohibition against "unfair competition." Sebert, *supra* note 14, at 230. Although there was significant discussion of the enforcement mechanism, the debate was not comprehensive in defining the breadth of the cease and desist power. See Sebert, *supra* note 14, at 230 n.24 (citing 51 CONG. REC. 12,145, 12,652, 14,932 (1914) (citing debates that reflected greater concern about FTC's inability to impose sanctions)). For instance, there was no discussion of what a reviewing court could do if it took issue with the provisions of a cease and desist order. But as the discussion in this section indicates, the legislative history is not "sketchy and inconclusive" on the issue of whether Congress intended the FTC to have restitutionary authority. The congressional decision not to give the FTC authority to impose sanctions clearly encompassed restitutionary orders, at least to the extent that such orders would attempt to rectify past injuries.

31. Wilson Address, *supra* note 8 (expressing grave concern about effect of uncontrolled monopolies on free-enterprise system).

32. Clayton Antitrust Act, ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. § 18 (1988)). The trade commission bill, H.R. 15,613, 63d Cong., 2d Sess. (1914), was referred to the Interstate Commerce Committees in each house and the Clayton bill, H.R. 15,657, 63d Cong., 2d Sess. (1914), was referred to the Judiciary Committees of each house.

33. The House bill adopted the proposal of a 1902 Industrial Commission study that recommended "as the chief measures of reform to check the growth of monopoly greater publicity regarding the operations of corporations, and particularly the establishment of some organ of publicity in the Federal Government." H.R. REP. NO. 533, pt. 1, 63d Cong., 2d Sess. 4 (1914). President Wilson's proposals included giving a private right of action to those injured due to violations of the antitrust laws, but that provision became part of the Clayton Act. Because the FTC Act is not defined in the Clayton Act as one of the "antitrust laws" whose violation gives rise to a cause of action, there is no authority for private damage suits for FTC Act violations. See Clayton Antitrust Act, §§ 1, 4(a), 15 U.S.C. §§ 12, 15(a) (1988).

34. Wilson Address, *supra* note 8 (promising that new commission would "do justice to business when judicial action is inadequate to provide fair remedy").

35. 51 CONG. REC. 8849 (1914) (remarks of Rep. Covington). The full context of Rep. Covington's remark is as follows:

The vast majority of the evils still existing in the industrial world will be in the future

best provisions of this bill is that providing for publicity."³⁶ The Progressives, who espoused greater regulatory intervention to combat monopolies, complained that the bill created a weak commission whose only purpose would be "news gathering for the courts and for Congress."³⁷ Despite criticism that the commission was toothless, the House passed the trade commission measure in substantially the same form as the Committee on Interstate and Foreign Commerce had reported it.³⁸

The Senate Committee on Interstate Commerce added teeth to the measure, reporting out a bill that added to the information gathering and reporting duties a prohibition of "unfair competition."³⁹ The committee's bill authorized the commission to issue orders "restraining and prohibiting" respondents from practices found to constitute "unfair competition."⁴⁰ The commission, however, was to

corrected by that pitiless publicity which will make the man of devious ways an object of reproach among his fellow men.

Id.

36. *Id.* at 8858 (remarks of Rep. Knowland). According to Representative Knowland: One of the best provisions in this bill is that providing for publicity. Many of us realize the fact that in many instances business concerns resort to certain doubtful practices because followed by their competitors, but if they knew that these practices had to be reported to a commission, and that the commission had the power to give the facts to the public, it would prove a very potent deterrent.

Id.

37. *Id.* at 8861 (remarks of Rep. Hinebaugh). The full text of Rep. Hinebaugh's comment is as follows:

The only purpose which the Democratic interstate trade commission will serve is that of news gathering for the courts and for Congress. Why should you limit the powers of your commission purely to matters of investigation if you really mean business? . . . Why do not you [sic] put teeth into the trade commission by adopting our plan to define and punish violations of the law? Why do not you [sic] give your trade commission power to prevent unfair competition? When an unfair practice or violation of the law has been established by the commission, why not give that same body power to punish and prevent a repetition? The people are looking for results.

Id.; see H.R. REP. NO. 533, pt. 3, 63d Cong., 2d Sess. 1 (1914) (Minority Report of Rep. LaFerty) (recommending that bill either be defeated or rewritten to adequately empower effective enforcement of antitrust laws).

38. See H.R. 15,613, 63d Cong., 2d Sess. (1914), reported in H.R. REP. NO. 533, 63d Cong., 2d Sess. 1 (1914), passed at 51 CONG. REC. 9910-11 (1914) (recording passage of bill and summary of votes by each representative).

39. S. REP. NO. 597, 63d Cong., 2d Sess. 3 (1914) (reporting S. 597, 63d Cong., 2d Sess. (1914)).

40. *Id.* at 4. The "cease and desist" language of the final legislation was contained in a substitute proposed by Senator Cummins for the section 5 language reported by the Committee. 51 CONG. REC. 12,873 (1914). There was no debate over this difference in wording. Apparently the change was made to accommodate an objection, raised early in the debate, to the original "restraining and prohibiting" language on the ground that those words are "words which have received clear judicial construction, and which pertain to the processes of the courts and . . . not to those of a commission." *Id.* at 11,185 (remarks of Sen. Saulsbury); see *id.* at 12,652 (remarks of Sen. Cummins) ("It does not make any difference what words we use. I quite agree that the words 'restrain' or 'prohibit' are words that are ordinarily applied to judicial process, but that makes no difference. The commission has no power to issue an injunction.").

have no enforcement power.⁴¹ If a respondent did not obey the commission's order, the Senate committee's bill authorized the commission to seek a court order requiring compliance.⁴² Only if the respondent violated that court order could the respondent suffer any meaningful adverse consequences. Any adverse consequences, then, would come from the courts, not the commission.⁴³

The debate in the Senate was lengthy and unfocused. A principal concern was with the meaning of "unfair competition." Unable to come up with a better definition that would cover all possible unethical activities businesspeople could devise to accomplish a monopoly, the general phrase was retained, with only a slight modification to read "unfair methods of competition."⁴⁴ The debate on "unfair competition" occurred at a time of public concern about the abuses of monopolies.⁴⁵ The focus of Congress was not so much on the competitor injured by unfair competition as it was on the general economic and social injury caused when small practices of "unfair competition" allow the perpetrator eventually to achieve monopoly power.⁴⁶ Thus, supporters of the legislation frequently referred to it as stopping monopoly in its incipiency, before injury had occurred.⁴⁷ For this reason, supporters perceived the restraining or-

41. 51 CONG. REC. 12,652 (1914) (remarks of Sen. Cummins).

42. *Id.*

43. See *id.* at 11,112 (remarks of Sen. Newlands). Sen. Newlands stated:

Mr. President, I will state that there is no other penalty in this act with reference to unfair competition than the one which the Senator suggests, and that is, if the order of the court is disobeyed, the court will then deal with the offender . . . This bill itself constitutes the extent to which society itself, in its collective capacity, will move in the direction of protecting a man against unfair competition.

Id.

The Wheeler-Lea Act of 1938 amended the Federal Trade Commission Act to allow courts to impose penalties for violations of final FTC orders. Wheeler-Lea Act of 1938, ch. 49, 52 Stat. 111, 113-15 (codified as amended at 15 U.S.C. §§ 45-57 (1988)). The "two-bites-at-the-apple" approach, under which a respondent under FTC order could avoid monetary penalties until it was found to have violated a court order, continued for orders entered pursuant to the authority given to the FTC to enforce the Clayton Act. This was not corrected until enactment of the Finality Act of 1959, Pub. L. No. 86-107, 73 Stat. 243 (amending Clayton Antitrust Act, § 11, 15 U.S.C. § 21 (1988)).

44. See 51 CONG. REC. 14,929 (1914) (remarks of Rep. Covington) (noting that meaning of term was sufficiently clear and included all "unjust, dishonest, and inequitable practices" used to damage competition). The House-Senate conference adopted the phrase "unfair method of competition" on the final version of the bill. *Id.* The rephrasing distinguished the new statutory concept from the common law concept that associated "unfair competition" only with the palming off of one's product as that of another. *Id.*

45. See Arthur B. Cornell, Jr., *Federal Trade Commission Permanent Injunction Actions Against Unfair and Deceptive Practices: The Proper Case and the Proper Proof*, 61 ST. JOHN'S L. REV. 503, 512 (1987) (noting that Federal Trade Commission Act was drafted to identify and prevent monopolistic practices harmful to public interest).

46. See 51 CONG. REC. 11,105 (1914) (remarks of Sen. Cummins) ("The unfairness must be tainted with unfairness to the public; not merely with unfairness to the rival or competitor.").

47. See *id.* at 11,455 (remarks of Sen. Cummins) (stating that purpose of statute is to

der as the appropriate remedy, sufficient to stop practices before they injured the public.⁴⁸ As for injury to competitors, Senate bill supporters viewed existing common law actions based on unfair competition and statutory actions pursuant to the Sherman Act as avenues of private recourse.⁴⁹

The debates, however, did consider the plight of the victim of unfair competition. Participants in the debates considered adding a provision allowing a private treble damage cause of action for anyone injured by reason of "unfair competition."⁵⁰ Those supporting this addition argued that if Congress was going to make unfair competition unlawful, it should give a remedy to those injured by that violation.⁵¹ In addition, they believed that a private remedy would

prevent initial creation of monopoly); *id.* at 11,539 (remarks of Sen. Cummins) (describing amendments to bill directed at allaying start of formation of monopoly); *id.* at 12,030 (remarks of Sen. Newlands) ("We want to check monopoly in the embryo."); *id.* at 12,146 (remarks of Sen. Hollis) (expressing concern that Sherman Antitrust Act is only invoked once monopoly is "full-grown"); *id.* at 12,623 (remarks of Sen. Newlands) ("[W]e have concluded . . . to reach practices which, whilst perhaps they might be incidentally reached through the administration of the Sherman antitrust law, could not always be reached. These practices constitute the very germ of monopolies."); *id.* at 14,929 (remarks of Rep. Covington) (explaining provisions of bill agreed on by House-Senate conference); *id.* at 14,941 (remarks of Rep. Stevens) (debating on conference report); *id.* at 14,927 (remarks of Rep. Covington) ("The most certain way to stop monopoly at the threshold is to prevent unfair competition.").

48. *See id.* at 12,791 (remarks of Sen. White) (finding that commission proceedings "are largely preventive in their purposes and objects").

49. *See id.* at 11,112 (remarks of Sen. Newlands) (noting that injured victim of unfair competition could seek legal or equitable remedy through private cause of action); *id.* at 11,533 (remarks of Sen. Cummins) (preferring civil to criminal penalty as more effective recourse); *id.* at 12,208 (remarks of Sen. McCumber) ("In all cases of fraud there is a remedy in the courts of law at the present time."); *id.* at 14,937 (remarks of Rep. Stevens) ("Thus it is that we provide that where the act or a series of acts injuriously affect the public interests, then this commission is given authority to interfere on behalf of the public, and on behalf of the public only The proceeding must not concern any injured individual; he must care for himself, exactly as he now does; but on behalf of the public in cases like that the commission may order the offender to cease and desist from that sort of practice.").

50. *See id.* at 13,141 (remarks of Sen. Clapp) (expressing concern for rights of injured citizens and recommending passage of private right of action for injured citizens, once practice is found unlawful). Professor Sebert asserts that "[o]ther possible sanctions, such as awarding of damages or restitution, do not appear to have been much discussed." Sebert, *supra* note 14, at 238. This statement is belied, however, by the congressional debates, particularly those occurring in the Senate.

51. *See* 51 CONG. REC. 11,301 (1914) (remarks of Sen. Borah) (stating that law prohibiting unfair competition can only be effective in fighting monopoly if commission is given sufficient enforcement power); *id.* at 11,533 (remarks of Sen. Norris) (focusing on period of time between filing of complaint and ultimate "cease and desist" order, and commenting that "[t]here ought to be a provision somewhere in the bill . . . that would make it unprofitable"). According to Senator Borah:

While you are taking care of a small man in this fight, you are also taking care of the monopolist. He escapes without any treble damages, without any trouble of moment, and with no punishment and without any costs, or without anything commensurate with the wrong. All he gets is a reprimand from the Government; and he will go out to find other victims, and you have got to have another lawsuit.

Id. at 11,598 (remarks of Sen. Borah); *see id.* at 13,065 (remarks of Sen. Clapp) (stating that punishment needs to be strong enough to be effective deterrent for potential wrongdoer); *id.* at 13,113 (remarks of Sen. Clapp) (stating that victim must have right to recovery); *id.* at

discourage businesspeople from engaging in such conduct.⁵² The proponents of this amendment believed that a cease and desist order entered at the conclusion of a commission proceeding did not provide an effective deterrent.⁵³ The fact that some members of the Senate considered a private right of action necessary demonstrates that they did not believe the cease and desist power alone could remedy injury inflicted before the order.⁵⁴

In the end, those arguing against a private remedy prevailed. They maintained that the breadth and vagueness of the prohibition against "unfair competition," which allowed the FTC to define "unfair competition" on a case-by-case basis, made it unfair to penalize businesspeople for engaging in conduct that they may have had no reason to believe was unlawful at the time.⁵⁵

14,788 (remarks of Sen. Reed) (debating report of House-Senate conference and noting inadequacy of commission order as sole penalty).

The desire of some for a remedy focusing on individual injury was motivated both by concern for the injured competitor and also by a desire to make the commission's action more meaningful. For example, during the debate on the conference report, Senator Reed stated:

But now I find we have devised a method for the control of these cases such as was never before conceived in the brain of any man to stop a practice admittedly criminal. Who has ever heard of creating a commission to determine, first, whether a man has been guilty of committing burglary, then to order him to stop, then to give him a right to appeal to a court, and in the end if he be defeated to solemnly adjudge that he must now stop? Why should a man hesitate to commit burglary with such a law as that? If he succeeds in escaping with the goods, wares, and chattels of his victim and is not detected he is so much the profitor. If he is detected all he has to do is to lay down the swag and seek other windows and other doors.

Id. at 14,790 (remarks of Sen. Reed).

52. See *id.* at 13,115 (remarks of Sen. Clapp) (arguing that subjecting potential violators to private causes of action would deter violations).

53. See *id.* at 13,148 (remarks of Sen. Clapp) ("The man who violates this law must be in precisely the same position as the man who commits a willful trespass. He has to respond in threefold damages—not for what he does after the court has stopped the trespass, but for what he did while he was committing the trespass . . .").

54. See, e.g., *id.* at 13,144 (remarks of Rep. Brandegee) ("That is all we have empowered this commission to do. . . . We have ordered, or authorized, them, when they have discovered, in their opinion, a case of unfair competition, to order it to cease."); *id.* at 13,145 (remarks of Rep. Clapp) (noting that order only prohibits further commission of unfair act); *id.* at 13,146 (remarks of Rep. Clapp) ("What I want to do is not to load this bill, but to put at least about a one-horse motor power somewhere in this legislation; and I believe the way to do it is to give the citizen who has been injured the right of action for threefold damages . . .").

55. See *id.* at 11,379-80 (remarks of Sen. Cummins) (expressing concern that those who violate the act without moral turpitude should not be unfairly punished); *id.* at 13,114 (remarks of Sen. McCumber) (finding treble damages against unsuspecting violator is harsh penalty); *id.* at 13,119 (remarks of Sen. Williams) (expressing concern that businesspeople performing established business practices not be punished retroactively for actions redefined as unfair or unlawful); *id.* at 13,121 (remarks of Sen. Reed) (noting unfairness of exposing businesspeople to vague or incomplete laws).

Although the private right of action was defeated, the sponsor of the amendment sought to qualify it before the vote. Senator Clapp suggested allowing private actions only after issuance of a commission order that the respondent had practiced unfair competition. *Id.* at 13,143 (remarks of Sen. Clapp). The change was suggested because of the Senator's view that nothing "is an offense until the commission shall first designate it as an offense." *Id.* To retain the deterrence objective of the proposed amendment, however, damages would have

Some who argued against the private remedy assumed that private causes of action for single damages already existed in the courts.⁵⁶ They believed that if the FTC found conduct to constitute unfair competition and an antitrust violation, those injured could take advantage of the private right of action given by the antitrust laws.⁵⁷ Other conduct categorized as "unfair competition," although not a violation of the Sherman Act, might be actionable under other common law theories.⁵⁸ And some believed (erroneously) that by making unfair competition illegal, Congress automatically created a private cause of action, analogous to private rights to compensation for injury arising out of criminal conduct of a defendant.⁵⁹ There is ample evidence, therefore, that in passing the FTC Act with its cease and desist language, Congress believed that many of those injured by unfair methods of competition would have some form of private relief available and would not be dependent solely on the FTC for relief.

When Congress debated the remedial provisions of the FTC Act, the prohibited activity involved only "unfair methods of competition." That type of activity does not suggest restitution as a remedy

been allowed arising from conduct predating the commission order. *Id.* at 13,148 (remarks of Sen. Clapp). *But cf.* *Heater v. FTC*, 503 F.2d 321, 324 (9th Cir. 1974) (denying retroactive impact for FTC orders).

56. See 51 CONG. REC. 13,120 (1914) (remarks of Sen. Reed) (asserting that there was no current limitation preventing victim from suing in court).

57. *Id.* at 13,149 (remarks of Sen. Newlands). According to Senator Newlands: "Any of these acts complained of covered by this section which amount to restraint of trade can be punished under the antitrust law." *Id.*

58. See *id.* at 11,112 (remarks of Sen. Newlands) (responding to concern that if commission's injunctive power was sole restraint on conduct of violators, violators might continue to act unlawfully until enjoined from doing that specific act, and then "engage in some similar form of unfair competition"). Thus, Senator Newlands noted, the Act is merely one means, exercised at a collective governmental level, to restrain unfair competition. Individual victims of unfair competition also have the ability to proceed in private causes of action. *Id.*; see also *id.* at 13,115 (remarks of Sen. Brandegee) (stating that even prior to judgment by commission, injured plaintiff could sue corporation for damages resulting from unfair practices); *id.* at 13,145 (remarks of Sen. Clapp) (arguing that citizen injured by violative conduct would be able to recover damages under Act despite absence of expressly stated remedy in statute); *id.* at 14,937 (remarks of Rep. Stevens) (arguing that injured individuals must resolve their claims through private means, and that individual who is injured by "deception, substitution, or misrepresentation" would have cause of action for fraud).

59. See *id.* at 13,054 (remarks of Sen. Cummins) (noting that enforcement would be achieved through "personal actions" rather than through public regulation); *id.* at 13,117 (remarks of Sen. Walsh) (stating that all victims of unfair competition have right to sue); *id.* at 13,145 (remarks of Sen. Clapp) (noting little difference between prohibiting wrong as "unlawful" versus "unreasonable"); *id.* at 13,146-47 (remarks of Sen. Shields) (maintaining likelihood of civil and criminal actions); *id.* at 13,148 (colloquy between Sen. McCumber and Sen. Cummins) (agreeing that any individual injured by unfair competition is entitled to sue for damages and prevail). These Senators were mistaken, however, in believing that a private cause of action would automatically be implied in legislation. See *Cort v. Ash*, 422 U.S. 66 (1975) (establishing four factors for determining when private cause of action may be implied).

in the same way that a violation of "unfair or deceptive acts or practices" does.⁶⁰ It is understandable, then, that Congress decided to leave injured individuals to their remedies at law for damages. Congress added the prohibition of unfair or deceptive acts or practices to the FTC Act twenty-four years later, while leaving the cease and desist remedy untouched.⁶¹ Accordingly, the addition of the deceptive act or practices prohibition should not now be used as a basis for inferring a congressional intent to distinguish between "damages" and "restitution," the former being at law and not part of the cease and desist power, but the latter representing a permissible equitable adjunct to the cease and desist power.⁶² At the time Congress adopted the cease and desist authority in 1914, the context of the prohibition in the bill then under consideration did not readily suggest the need for an equitable restitutionary remedy.

Senator Newlands, one of the sponsors of the legislation that became the FTC Act, contended that including an express private right of action for damages would defeat the bill's purpose of providing fast and efficient guidance to businesspeople.⁶³ With the prospect of a damages action following an FTC proceeding, a respondent would not cooperate with the agency in seeking its advice and thereafter conform its practices to that advice.⁶⁴ Instead, the respondents would dig in and fight to avoid the financial burden of paying private relief.⁶⁵ Senator Newlands' conception of this legis-

60. Cf. 51 CONG. REC. 13,007 (1914) (remarks of Sen. Cummins) ("I do not think the inquiry into [unconstitutional] confiscation will often arise under the 'unfair competition' section.").

61. Wheeler-Lea Act of 1938, ch. 49, Pub. L. No. 75-447, 52 Stat. 111 (codified as amended at 15 U.S.C. §§ 45-57 (1988)). Congress' later addition of "unfair or deceptive acts or practices" as a subject of FTC concern would not change the nature of the FTC's remedial authority unless Congress amended the Act to that effect. No such amendment was made in 1938. See *infra* notes 85-120 and accompanying text (noting absence of legislative history indicating intent to broaden FTC remedial authority).

62. The FTC and the principal commentator on the remedy both assert that the congressional intention not to allow "damages" did not also apply to the awarding of "restitution." Universal Credit Acceptance Corp., 82 F.T.C. 570, 653, 655-66 (1973) (discussing FTC's reasons for finding restitutionary authority in its cease and desist power), *rev'd sub nom.* Heater v. FTC, 503 F.2d 321 (9th Cir. 1974); Curtis Publishing Co., 78 F.T.C. 1472, 1517 (1971) (distinguishing between unfair practices that harm the public which FTC has power to correct and unfair practices that harm individuals but are outside of FTC's power); Sebert, *supra* note 14, at 239 (distinguishing between damages that put plaintiff in position as though contract had been performed and those that only correct unjust enrichment); see *infra* note 138 (discussing whether FTC has authority to order legal damages and equitable restitution remedy).

63. 51 CONG. REC. 13,116, 13,143 (1914) (remarks of Sen. Newlands) (stressing importance of educative role of Act).

64. *Id.* (noting likelihood that presence of damages provision might dissuade potential violator from consulting with FTC for guidance).

65. *Id.* at 13,116 (remarks of Sen. Newlands). According to Senator Newlands:

We hold this sword of Damocles above every business man in the country, and either compel him to abandon a practice which perhaps he thinks is right, or to pursue litigation to the bitter end, when we want through this instrumentality not to punish,

lation as experimental and educational prevailed. He stated, "I do not want to see this bill accepted by the business community as carrying terror and destruction. I hope they will feel, as I feel, that it will be an instrumentality of beneficence."⁶⁶ Senator Newlands urged that the bill was not intended to define crimes and misdemeanors, nor to be punitive. Rather, Newlands said that the bill "is educational and corrective in character, and we wish through it to establish administrative law upon the subject so that every man engaged in trade in the country can have a proper understanding of what the law allows and what the law forbids."⁶⁷

In view of the originality of the concept that this legislation introduced, its supporters urged that Congress move cautiously.⁶⁸ Once experience was gained with the new commission, changes and enhancement of its powers could follow in future legislation.⁶⁹ The

but to secure higher standards of conduct, by rules that will be laid down by this commission and sustained by the court, and which will have an educational effect upon the commerce of the country.

Id.; *see id.* at 13,143 (remarks of Sen. Newlands) (advocating nonpunitive approach to avoid excessive litigation and enhance public policy of educating businesspeople about new regulation).

66. *Id.* at 13,116; *see id.* at 13,119 (remarks of Sen. Stone) ("This . . . is an experimental legislative enterprise upon which we are entering."); *id.* at 13,120 (remarks of Sen. Stone) (recommending limited approach during "experimental" period).

67. *Id.* at 13,149; *see id.* at 14,788 (remarks of Sen. Reed) (discussing conference report on new legislation and contemptuously characterizing commission's remedial authority). Senator Reed noted:

We have discussed section 5 until I think we know what it is intended to mean. It is intended to place in a board the right to say what is fair and what is unfair in trade; to give that board the right to issue an order of prohibition against the particular practice it does not like, and if that order is not obeyed no penalty whatever follows—no fine, no imprisonment, nothing, except that a man may be called to court and that the court may then affirm or set aside the judgment or order; and then no penalty follows unless the order of the court is violated. Thus, instead of having criminal penalties, instead of having the shadow of the jail hanging over those who indulge in practices which are unjust and improper, we have a long course of delay, followed by nothing worse in the end than an order saying, "You must stop something out of which you have been making money."

Id.

68. *Id.* at 13,120 (remarks of Sen. Stone). As Senator Stone commented:

[I]nasmuch as this is an experimental kind of legislation we are entering upon, may we not undertake to do too much? Let us get the commission, and give to it all reasonably necessary authority, and stop there. . . . I am fearful about putting amendments of this nature in the bill. I have a well-formed conviction that if we attempt to do too much we will accomplish less for the public good.

Id.

69. *Id.* at 13,143 (remarks of Sen. Newlands).

It seems to me that legislation of this kind might well be deferred until later on, when the commission, having acquired experience in these matters, will, under the power of recommendation, suggest legislation to Congress that will make the act more efficient.

Id.; *see id.* at 13,149 (remarks of Sen. Newlands) (recommending that legislation directed at punishing violators be delayed until determinations about what practices constitute violations can be more clearly and knowingly defined).

vote was decisive against the inclusion of a private remedy.⁷⁰

The Senate also rejected a proposed amendment giving a complainant to the proposed commission the right to appeal from a commission determination that unfair competition had not occurred.⁷¹ Sponsors of the bill, who opposed the amendment, explained that "[w]e are trying here to make the regulation effectual, not for the benefit of an individual, but for the benefit of society."⁷² Again, the majority viewed private actions in the courts as the appropriate vehicle for the redress of private grievances.⁷³

That there was no congressional intent to care for victims through the trade commission legislation is further supported by Congress' awareness of a well-known provision of the Interstate Commerce Act. Under its terms, the Interstate Commerce Commission (ICC) could determine the fairness of rates charged by carriers and, if the rates were deemed excessive, order future rates to be reduced. In addition, the ICC could order the payment of refunds to customers who had been overcharged. If the carrier refused to pay the refund, the customer could bring its own action in district court and the ICC's finding of unfairness would be *prima facie* evidence in the refund action. This ICC procedure, which was discussed several times in the debates on the trade commission bill, was never proposed as a remedy for those who were victims of "unfair competition."⁷⁴ On

70. *Id.* at 13,149. The vote was 41-18. *Id.* Without the passage of the amendment, it was understood that the Act did not grant relief for private injury. *See id.* at 13,050 (colloquy between Sen. Cummins and Sen. Clapp) (debating need for private remedy in addition to public enforcement ability).

71. *Id.* at 13,317. The amendment was defeated by a vote of 38-27. The right of a complainant to appeal a commission finding that a business had not engaged in an unfair method of competition was included in a proposal to amend the bill offered earlier in the debate. *See id.* at 12,993 (setting forth amendment offered by Sen. Pomerene). The Senate rejected that proposal and voted for a substitute amendment offered by Senator Cummins which did not include such a right of review. *See id.* at 13,045 (suggesting alternative amendment as substitute for Pomerene amendment); *id.* at 13,109 (adopting substitute).

72. *Id.* at 13,050 (remarks of Sen. Cummins); *id.* at 13,062 (remarks of Sen. Clapp) (stating that intent of bill was for commission to give "definite guidance" as to what is and what is not law).

73. *See id.* at 13,102 (remarks of Sen. Cummins) ("Its enforcement is precisely like that of a criminal statute; society enforces the statute; society, through the commission or through the Government, enforces the law, leaving each individual to the recovery of his damages according to the law, but not through the commission, which is a representative of the Government."); *id.* at 13,150-51 (remarks of Sen. Cummins) (stating that while judgment of commission should be admissible as *prima facie* evidence in subsequent litigation, it should not be conclusive).

74. *See, e.g., id.* at 12,652 (remarks of Sen. Cummins) (asserting trade commission order does not usurp judicial function); *id.* at 12,815 (colloquy between Sen. Cummins and Sen. Sutherland) (debating merits of powers granted to ICC); *id.* at 13,005 (colloquy between Sen. Saulsbury and Sen. Cummins) (noting that Interstate Commerce Act provides several methods of reviewing ICC orders); *id.* at 13,054-56 (colloquy between Sen. Cummins and Sen. Sutherland) (disagreeing about whether ICC encroached on judicial power by making determinations of unreasonable or unjust discrimination).

the contrary, Senator Cummins stated that the ICC procedure "has no relevancy or similarity to the question we are now discussing."⁷⁵

A significant amount of debate focused on whether the commission's determination of unfair competition and its subsequent issuance of a cease and desist order constituted legislative or judicial activity.⁷⁶ The issue was important because of considerations concerning constitutional separation of powers.⁷⁷ In view of Congress' sensitivity to the constitutional issue, if it believed it was giving the new commission a restitutionary power, typically a judicial equitable power, elaborate trial and review procedures certainly would have been adopted. As was noted more than once in the debates, however, the commissioners were not required to be lawyers,⁷⁸ and the FTC procedures were to be informal with no requisite rules of evidence.⁷⁹

75. *Id.* at 13,005 (remarks of Sen. Cummins); *id.* at 13,046 (remarks of Sen. Cummins).

76. *Id.* at 12,652. Senator Cummins, one of the principal supporters of the legislation, argued that what the commission was empowered to do did not cross over the line into judicial activity:

MR. CUMMINS: If we believe that unfair competition . . . ought to cease in interstate commerce, we have a right to prohibit it.

....

And we have a right to prevent it in any way that we see fit—

....

Save that we can not punish; we can not usurp judicial powers. Under our Constitution we can not send an offender to jail; we can not impose upon him a fine; we can not in any way trespass upon or invade the judicial functions; but if we can prevent the recurrence of unfair competition without recourse to fines, imprisonment, jail, or injunction, we have an ample and abundant constitutional authority to do so. The only limitation is the constitutional prohibition against invading the judicial power. The judicial power does not extend to the work which this Commission is authorized to do.

Id. The fact that the commission would have to seek judicial enforcement of its order if a respondent failed to obey it does not suggest that Congress believed that a commission judicial-type order redressing past injury could pass constitutional muster simply because the order required judicial enforcement. *Id.* Cummins' point was that the commission would act as an arm of Congress refining a broad legislative definition of unfair methods of competition on a case-by-case basis and, like legislation, those definitional refinements would then apply to future market activity. *Id.* at 13,046 (remarks of Sen. Cummins).

77. Although the issue was not resolved in this debate, the Supreme Court later stated that in performing its adjudicative function, the Commission acts in part "quasi-legislatively and [in part] quasi-judicially." *Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935).

78. *See, e.g.*, 51 CONG. REC. 12,216 (1914) (remarks of Sen. Brandegee) (noting absence of any requirement that issues be decided by lawyers, only that they be decided by knowledgeable businesspeople); *id.* at 13,005 (remarks of Sen. Pomerene) (emphasizing need for both business and legal expertise on commission); *id.* at 13,106 (remarks of Sen. Myers) (advocating role of commission as nonlegal in nature); *id.* at 13,121 (remarks of Sen. Reed) (cautioning against creation of complex legal enforcement agency that would be incomprehensible to average citizen).

79. *Id.* at 11,533 (remarks of Sen. Cummins) (referring to commission proceedings as "summary proceedings"); *id.* at 12,029 (remarks of Sen. Saulsbury) (referring to commission proceedings as securing rights of persons "in a preliminary way"); *id.* at 13,106 (remarks of Sen. Myers) (recommending that hearings be conducted "in a summary manner" without legal formalities); *id.* at 13,159 (remarks of Sen. Cummins) ("The commission under this bill is given certain power to make an investigation or hold a hearing and issue an order. That

In addition, the procedures for review of adopted FTC orders did not reflect an expectation that the FTC would be awarding monetary relief. In the reported Senate bill, there was no provision for court review.⁸⁰ This concerned many senators who believed that the commission's function of reviewing and branding past actions unlawful was a judicial function that required judicial review (some suggested a *de novo* court hearing) to be constitutional.⁸¹ In the end, the Senate added a review provision to the bill which was modified in conference. The modified bill provided for judicial review by courts of appeals, but limited "the power of the courts to review the orders of the commission just as much, but no more, than the Constitution certainly permits."⁸² Thus, the commission's findings of fact were to be conclusive "if supported by testimony," with only its conclusions of law subject to judicial review.⁸³ Particularly in view of the precedent of broad review of ICC orders for the payment of overcharges to shippers, it is unlikely that Congress would have accepted the limited court of appeals review procedure adopted in the FTC Act had members of Congress anticipated that FTC orders

will be done in very much less time and in a much more summary way than it could possibly be done in the courts.").

80. See *id.* at 11,451, 13,007, 13,045 (remarks of Sen. Cummins). The federal judiciary was simply made available to the commission to obtain a court order enjoining the violation of previously issued commission orders. *Id.* The court's review would have been limited to determining whether the commission acted nonarbitrarily within the scope of its authority and without contravening respondent's rights. *Id.*; see *id.* at 13,066 (remarks of Sen. Newlands) (noting that bill did not include court review).

81. See *id.* at 13,109-10 (remarks of Sen. Sutherland) (maintaining that assigning "judicial" power to administrative agencies would be unconstitutional). Senator Sutherland viewed the power of the ICC to order future rates after finding past rates of common carriers unreasonable as "legislative." *Id.* He saw the obtaining of refunds by those overcharged as "judicial" and, therefore, requiring greater judicial scrutiny mandated by the Act. *Id.* Looking at the FTC Act, he viewed a determination by the commission that one had engaged in unfair competition as closer to the judicial than the legislative function. *Id.* at 13,111. This view differed from that of Senator Cummins, one of the bill's sponsors. See *supra* note 76 (stating that commission determinations do not usurp judicial power). But in conference, the Sutherland view that a commission determination, looking to past practices and ordering their cessation, is judicial, while the ICC engages in the legislative act of mandating future rates, had an impact. See 51 CONG. REC. at 14,931-33 (1914) (remarks of Rep. Covington) (describing conference report as reflecting congressional concern that commission exercise legitimately delegated legislative power, but that its judicial decisionmaking authority is more circumscribed). Thus, the review provision finally adopted made the FTC's role as fact-finder conclusive if supported by the record, but allowed federal courts of appeals to review the FTC's determinations of law.

82. 51 CONG. REC. 14,931 (1914) (remarks of Rep. Covington); see also *id.* at 11,179, 12,997 (remarks of Sen. Hollis) (stating that judicial review could range from requiring *de novo* trial on appeal or giving commission decision *prima facie* weight subject to rebuttal by respondent, to making commission decision "absolutely binding unless the court should think there is bad faith or that the commission has not used sound judgment."). The latter standard, similar to the one finally adopted, was viewed by Senator Hollis as "extremist." *Id.*

83. This standard has become the "substantial evidence" standard under the Administrative Procedure Act, 5 U.S.C. § 706(2)(E) (1988) (setting forth scope of review for government agency actions).

could include restitutionary relief. For the above reasons, both the explicit and implicit legislative history of the FTC Act contradicts the FTC's assertion that a restitutionary authority is an implied attribute of its cease and desist power.⁸⁴

2. *The Wheeler-Lea Amendments of 1938*

The cease and desist remedial provision written into the FTC Act in 1914 prohibited "unfair methods of competition."⁸⁵ Although the FTC thereafter brought actions challenging advertising and other forms of commercial promotion, the Supreme Court held in 1931 that demonstration of an injury to competition was essential for unfair methods of competition actions;⁸⁶ consumer injury alone was insufficient.⁸⁷ This placed an additional burden of proof on the FTC and also meant that when a respondent had a monopoly in a certain market, it could not be charged with fraud or deceit because no competitor would be injured.⁸⁸ Thus, the FTC began efforts to gain the authority to prohibit "unfair or deceptive acts or practices" in addition to "unfair methods of competition."

Those efforts culminated in the Wheeler-Lea Act amendments to the FTC Act in 1938.⁸⁹ Congress combined the proposal to expand the FTC's jurisdiction with another piece of legislation designed to address a national crisis in the advertising and sale of drugs and devices that could endanger health.⁹⁰ There was virtually no opposition to the proposition that the FTC should be given the authority to prosecute "unfair or deceptive acts or practices" without having to prove anticompetitive consequences.⁹¹ The legislative history

84. See *infra* notes 121-87 and accompanying text (analyzing absence in legislative history of authority to grant restitution).

85. See *FTC v. Gratz*, 253 U.S. 421, 427-28 (1920) (finding that before FTC can issue cease and desist order, record must indicate existence of unfair method of competition); see also 51 CONG. REC. 12,145 (1914) (remarks of Sen. Hollis) (stating that phrase "unfair methods of competition" connotes activity broader than common law "unfair competition" involving palming off one merchant's goods as those of another).

86. *FTC v. Raladam Co.*, 283 U.S. 643, 646-49 (1931) (noting that FTC must decide whether activity adversely affected competition in commerce).

87. See *id.* at 646 (holding that interest of public is only one part of three-step analysis that FTC must consider before issuing cease and desist order).

88. *Id.* at 649 (requiring that FTC must first determine that party in question used or is using unfair method of competition).

89. Wheeler-Lea Act of 1938, ch. 49, 52 Stat. 111 (codified as amended at 15 U.S.C. §§ 45-57 (1988)).

90. See *infra* note 93 (discussing combination of two pieces of legislation). The Act also streamlined enforcement of FTC cease and desist orders by making them final when entered, thus bypassing the need for a separate court mandate ordering compliance before a violation could be found, and authorizing the imposition of penalties for violations of final orders. See Federal Trade Commission Act, § 5(l), 15 U.S.C. § 45(l) (1988) (stating also that district courts are empowered to grant injunctive relief when violations of FTC orders are found).

91. See 83 CONG. REC. 396 (1938) (remarks of Rep. Crosser) (stating that extension of

does not suggest, however, that in expanding the FTC's authority to encompass consumer protection (unfair or deceptive acts or practices) in addition to the competitive environment (unfair methods of competition), Congress also intended to expand its remedial authority. In fact, the reports and debates echo Congress' original understanding in 1914 that the FTC's remedial authority was limited to prohibiting, in the future, practices that had occurred in the past. As to the FTC's new authority to prosecute "unfair or deceptive acts or practices," its purpose was clear.⁹² The amendment was intended only to give the FTC authority to prohibit conduct that was unfair or deceptive to consumers without requiring the FTC to prove anticompetitive effect.⁹³

The principal debate on the Wheeler-Lea Act concerned the additional provisions authorizing the FTC to prosecute unfair or deceptive advertising of food, drugs, devices, and cosmetics.⁹⁴ Those provisions gave the FTC authority to request the United States Attorney General to seek preliminary injunctions in district courts against false advertising of covered products pending FTC administrative proceedings.⁹⁵ They also authorized courts to impose criminal penalties for unfair or deceptive advertising of food, drugs, devices, or cosmetics when it could be proven that the offender sold

FTC's authority over unfair or deceptive acts or practices is necessary regardless of whether anticompetitive activities are shown).

92. See *id.* at 397-98 (statement of Rep. Reece) (addressing scope of amendment and discussing its implications).

93. See REPORT OF SENATE COMM. ON INTERSTATE COMMERCE, S. REP. NO. 221, 75th Cong., 1st Sess. 2 (1937) (reporting S. 1077 which passed the Senate without debate and was combined with food and drug amendments in House to become Wheeler-Lea Act). The Report stated:

The inevitably sound conclusion is that where it is not a question of a purely private controversy, and where the acts and practices are unfair or deceptive to the public generally, they should be stopped regardless of their effect upon competitors. This is the sole purpose and effect of the chief amendment to section 5.

Id.; see also *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972) (stating that Wheeler-Lea Act "charged the FTC with protecting consumers as well as competitors"); *Pep Boys—Manny, Moe & Jack, Inc. v. FTC*, 122 F.2d 158, 160-61 (3d Cir. 1941) (finding that FTC can focus on protection of consumers).

94. Federal Trade Commission Act, § 12, 15 U.S.C. § 52 (1988); see, e.g., 83 CONG. REC. 393 (remarks of Rep. Mapes) (discussing controversy surrounding giving FTC control over advertising of food, drugs, cosmetics, and devices); *id.* at 395 (remarks of Rep. Wolverton) (noting that major debate centers on who will enforce provisions of bill and what is appropriate punishment); *id.* at 399 (remarks of Rep. Reece) (noting that one side of debate focuses on insufficiency of provisions while other side feels bill invests too much power in FTC).

95. Federal Trade Commission Act, § 13(a), 15 U.S.C. § 53(a) (1988). Notwithstanding congressional recognition of the injury that can occur to consumers between the time of issuance of a FTC complaint and the entry of a final order, the right to seek preliminary injunctive relief was limited to activities involving the advertising of food, drugs, devices, and cosmetics. See 83 CONG. REC. 398 (1938) (remarks of Rep. Reece) (stating that under pending legislation, FTC will have right to seek injunction to prevent dissemination of false or misleading advertisement which may be injurious to human health).

something injurious to human health or acted with intent to deceive.⁹⁶

There were two principal objections to the food and drug proposals.⁹⁷ One group believed that enforcement power over false advertising of medical-type products should be given to the Food and Drug Administration (FDA), which already had jurisdiction over drug labeling.⁹⁸ The second objection was that the criminal penalty provision was too weak because it applied only to intentional or inherently harmful situations involving food and drugs.⁹⁹ Thus, criminal penalties would not apply to false advertising for all food and drugs or to all false advertising subject to FTC jurisdiction.¹⁰⁰

The common thread of these objections is the perception of the limitations inherent in the FTC's cease and desist remedial authority. Those who supported FDA enforcement of false advertising of food, drugs, devices, and cosmetics did so because the FDA had authority to seek immediate criminal penalties for false labeling of drugs.¹⁰¹ This was perceived to be a stronger deterrent than the cease and desist power of the FTC.¹⁰² A House opponent of FTC authority over advertising of food and drugs complained that the FTC Act was ineffective in preventing the initial publication of false advertising and in stopping continuing publications until after issuance of an injunctive order.¹⁰³ A Senate opponent, referring to his vote in the previous Congress opposing FTC enforcement of a prohibition against false advertising of health-related items, stated: "I was not willing to compromise by leaving to the demonstrated ineffective control of the cease-and-desist order procedure of that [FTC Act] law, false advertising that had a relationship to public

96. Federal Trade Commission Act, § 14(a), 15 U.S.C. § 54(a) (1988).

97. See 83 CONG. REC. 399 (1938) (remarks of Rep. Reece) (noting that while objections still existed, proposed bill was balance between two positions).

98. See *id.* at 399-400 (remarks of Rep. Chapman) (reasoning that Food and Drug Administration is appropriate agency for dealing with both initial and subsequent publication of false advertisements).

99. *Id.* at 396 (remarks of Rep. Wolverton) (noting that opponents of bill feel that provisions would not provide any deterrent effect).

100. *Id.* at 3292 (remarks of Sen. Copeland) (stating that more effective bill would provide criminal penalties for false advertising of all commodities).

101. *Id.* at 399 (remarks of Rep. Chapman) (discussing Food and Drug Act's deterrent effect over businesses that improperly label goods).

102. See *id.* at 394 (Statement of Rep. Kenney) (claiming that cease and desist orders have no deterrent effect).

103. *Id.* at 399-400 (remarks of Rep. Chapman) (stating that by time cease and desist order is made effective, many individuals will be harmed). One representative noted that the FTC Act "sets up procedural machinery which is designed to prevent unfair practices upon competitors in the interest of the public; but that machinery was not intended primarily to protect the consuming public and such machinery under this bill will be ineffective to protect the public from false advertising." *Id.* at 394 (remarks of Rep. Kenney).

health."¹⁰⁴

The other debate on the food and drug amendments focused on remedial procedures that would be applied to combat health-related false advertising.¹⁰⁵ One criticism was that stronger remedies ought to apply to all "unfair and deceptive" conduct,¹⁰⁶ while another faction complained that the heightened remedial provisions for false advertising of food, drugs, devices, and cosmetics were not tough enough.¹⁰⁷ Both criticisms were based on the premise that the "cease and desist" procedure then in effect at the FTC was not an effective remedy.¹⁰⁸ The Report on the Wheeler-Lea legislation prepared by the House Committee on Interstate and Foreign Commerce added the food and drug amendments. It drew separate "additional views" from three members of the committee who believed that unless criminal penalties were applicable to all false advertising of food and drugs, there would be no deterrent value in the law.¹⁰⁹ They complained, "It is just this deterring effect that is lacking when dependence is placed upon the cease and desist order for enforcement."¹¹⁰ The three members relied on a leading commentator on FTC law who noted these limitations and stated, "[o]ne who violates the [Pure Food and Drugs] act may be criminally prosecuted [by the Department of Agriculture], whereas the Federal Trade Commission can only order him to cease and desist, without even forfeiting the unlawful gains derived from the violation."¹¹¹ The group urged that all false advertising of health-related products be subject to

104. *Id.* at 3288 (remarks of Sen. Copeland).

105. *See id.* at 406 (remarks of Rep. Kenney) (proposing additional amendment designed to apply punishments to all those who participate in false advertising).

106. *Id.* at 3293 (remarks of Sen. Copeland) (expressing hope that bill would extend to all commodities, not just food, drugs, devices, and cosmetics).

107. *Id.* at 398 (statement of Rep. Reece) (noting that bill does not have "teeth" effective enough to deal with health injuries caused by false advertising).

108. *See id.* at 400 (statements of Rep. Kenney) (stating that cease and desist orders are ineffective against false advertising because once advertising is in stream of commerce, its effects continue regardless of whether subsequent advertisements are published).

109. H.R. REP. NO. 1613, 75th Cong., 1st Sess. 23-27 (1937) (additional views of Reps. Chapman, Kenney, and Mapes) (offering that only effective deterrent is imposition of appropriate criminal penalties).

110. *Id.* at 24 (additional views of Reps. Chapman, Kenney, and Mapes).

111. *Id.* at 25 (quoting GERALD C. HENDERSON, *THE FEDERAL TRADE COMMISSION* 230 (1924)) (additional views of Reps. Chapman, Kenney, and Mapes). These three committee members went on to comment:

Even after the order became effective, the false information or claims contained in the advertisement would still repose in the minds of the millions of persons who had read or listened to or been told about the claims made in the advertisement. And the manufacturer will have reaped the benefits of the false advertisement without the slightest fear of a penalty of any kind.

Id. at 26. The additional views were clear in directing criticism at the weak remedial authority itself and not at the FTC for not exercising authority it had. *Id.*

criminal penalties regardless of intent or inherent danger.¹¹²

Even the committee's majority report, in explaining its proposed spectrum of remedies for false advertising of food and drug products, conceded the relative innocuousness of an FTC cease and desist order.¹¹³ The committee explained that it had designed a hierarchy of remedies for such practices, including temporary restraining orders and criminal penalties for intentional deception or for misrepresenting products that could cause injury.¹¹⁴ For advertising as to which intent or inherent dangerousness could not be demonstrated, the committee recommended that "[f]or the offender whose transgression is trivial, inadvertent, or innocent of law offending purpose, the regular procedure of the Federal Trade Commission through a cease and desist order can be followed."¹¹⁵

In the end, Congress adopted the "middle-road" solution of the committee.¹¹⁶ The weak cease and desist procedure would apply to "unfair and deceptive acts or practices" and to false advertising of food, drugs, devices, and cosmetics.¹¹⁷ An exception, allowing the FTC to seek criminal penalties, would apply if the item was inherently dangerous or if the advertising was intentionally deceptive.¹¹⁸ The majority explained that there was justification in treating deception regarding a dangerous product affecting a person's health differently than a product that simply affects one's pocketbook.¹¹⁹ To those who believed the stronger remedy should apply to all deception, Senator Wheeler explained that such a proposal "would bring down on our heads every businessman in the United States."¹²⁰

While these understandings of the FTC's remedial authority, expressed twenty-four years after passage of the enabling legislation, should not be looked to as dispositive of legislative intent in 1914, the legislative history is persuasive that Congress had no intention

112. See *id.* at 27 (additional views of Reps. Chapman, Kenney, and Mapes) (noting adverse effect on consumer is same regardless of advertiser's intent).

113. *Id.* at 6.

114. See *id.* (finding that because of wide variety and degree of potential offenses, one penalty could not be applied to all).

115. *Id.*

116. Wheeler-Lea Act, 15 U.S.C. §§ 45-57 (1988); see 83 CONG. REC. 399 (1938) (remarks of Rep. Reece) (stating that bill strikes "happy medium"); *id.* at 410 (remarks of Rep. Lea) (stating that bill treads "middle path").

117. See 83 CONG. REC. 397-99 (1938) (statement of Rep. Reece) (discussing application of cease and desist orders to prevent dissemination of false advertising).

118. *Id.*

119. *Id.* at 3256 (remarks of Sen. Wheeler) ("More stringent control over the advertising of these four commodities has been provided because their use directly affects the consumer's health rather than his pocketbook.").

120. *Id.* at 3293.

of expanding the limited remedial scope of the FTC cease and desist order with the Wheeler-Lea Act.

B. The Curtis Case: The FTC's Expansive Self-Interpretation of the "Cease and Desist" Authority

Notwithstanding the legislative history, the FTC in the early 1970s asserted that section 5 cease and desist authority gave it the power to order the payment of refunds to consumers injured by a respondent's unfair or deceptive acts or practices.¹²¹ This position was taken in a case against the Curtis Publishing Company regarding its handling of uncompleted subscriptions when it stopped publishing *The Saturday Evening Post* in 1968-1969.¹²² Instead of paying refunds to subscribers for the unused portions of their subscriptions, Curtis offered a list of magazines from which subscribers could select substitutes for the time remaining on their *Post* subscriptions.¹²³ The FTC's complaint alleged that Curtis' failure to offer and give refunds, as well as the company's failure to advise customers that they were entitled to refunds, constituted unfair or deceptive conduct under section 5 of the FTC Act.¹²⁴ The proposed order would have required Curtis to notify all its former *Post* subscribers that they were entitled to cash refunds.¹²⁵

After trial, the administrative law judge ordered the complaint dismissed on the ground that the relief was beyond the cease and desist authority of the FTC.¹²⁶ The judge concluded that the cease and desist authority did not enable the FTC to order affirmative acts, impose retroactive remedies, or grant money judgments.¹²⁷ On appeal to the full Commission, the FTC disagreed with the administrative law judge regarding its authority to order refunds, but affirmed the dismissal on several different grounds unique to the

121. Curtis Publishing Co., 78 F.T.C. 1472, 1476 (1970) (initial decision) (setting forth FTC's complaint that claims "that publishing company participated in unfair and deceptive practice by failing to offer subscribers refunds for unused subscriptions"), *aff'd on other grounds*, 78 F.T.C. 1472, 1507 (1971) (Comm'n op.).

122. See Curtis Publishing Co., 78 F.T.C. 1472, 1516-17 (1971) (Comm'n op.) (determining that FTC has necessary power to require restitution of money illegally held). *The Saturday Evening Post* resumed publication two years later as a monthly. See *Saturday Evening Post to Reemerge Next Week*, WALL ST. J., June 3, 1971, at 31 (Eastern ed.).

123. Curtis Publishing, 78 F.T.C. at 1474 (compl. ¶ 4 & 5).

124. *Id.* at 1474-75 (compl. ¶ 7 & 9). The FTC deemed the conduct misleading in that subscribers were led to believe that there was no choice other than to substitute another magazine for the unexpired portion of their subscriptions. *Id.* at 1474 (compl. ¶ 7).

125. *Id.* at 1508-09 (Comm'n op.).

126. *Id.* at 1502 (initial decision).

127. Curtis Publishing Co., 78 F.T.C. 1472, 1502 (1970) (initial decision), *aff'd on other grounds*, 78 F.T.C. 1472, 1507 (1971) (Comm'n op.).

Post and *Curtis*.¹²⁸ The FTC's decision asserting its authority to order refunds but dismissing the complaint left no order for *Curtis* to take to a court of appeals. Thus, the FTC's assertion of its own authority stood without court review.

The FTC's rationale for asserting the authority to order refunds simply ignored legislative history.¹²⁹ Instead, it invoked the generally expansive language of the courts with regard to the discretion given to the FTC in its choice of remedy and controverted each of the three assertions on which the administrative law judge premised his conclusion that no redress authority existed.¹³⁰

The *Curtis* opinion started with the oft-cited proposition enunciated by the Supreme Court in *Jacob Siegel Co. v. FTC*¹³¹ that "courts

128. *Curtis Publishing Co.*, 78 F.T.C. 1472, 1507 (1971) (Comm'n op.). Commissioner Dixon wrote the opinion for the four Commission members hearing the appeal. *Id.* (Comm'n op.). Chairman Kirkpatrick had been counsel to *Curtis* before his appointment to the Commission and did not participate. *Id.* at 1525 (Comm'n op.). Commissioner MacIntyre concurred in the result. *Id.* (Comm'n op.). Although agreeing with Commissioner Dixon as to the Commission's authority to order refunds, Commissioners Jones and Dennison disagreed with his reason for dismissal. *See id.* at 1520-24 (Comm'n op.) (stating that dismissal is warranted because respondent's probable bankruptcy made refunds unrealistic possibility).

With regard to dismissal, Commissioner Dixon concluded that the complaint was limited to the allegation that *Curtis* had misled subscribers about their right to a refund. *Id.* at 1518 (Comm'n op.). Such a right was a matter of contract law that required proof of the law of the fifty states and also the circumstances surrounding each subscriber's contract before rights could be determined. *Id.* at 1519 (Comm'n op.). This proof was not in the record. *Id.* (Comm'n op.). Furthermore, because the complaint was limited to alleging misrepresentation as to rights, an order requiring that *Curtis* advise subscribers of their rights would be sufficient to remedy the offense. *Id.* at 1520 (Comm'n op.). No restitution would be necessary. *Id.* (Comm'n op.). Commissioner Dixon concluded that even if the complaint had alleged the retention of subscriber money as an unfair practice, restitution would not have been an appropriate remedy because that retention did not affect future competition and, in any event, *Curtis* was not financially able to pay the refunds even if ordered. *Id.* (Comm'n op.). He concluded by noting that subscription income covered only a small portion of the publication's cost and that *Curtis* did not benefit from unjust enrichment. *Id.* (Comm'n op.).

Commissioners Jones and Dennison believed that the Commission could take notice of subscribers' legal right to refunds and that the burden should be shifted to the respondent to prove any state law that would negate general contract principles. *Id.* at 1521-22 (Comm'n op.). They also read the complaint as containing an allegation that the retention of subscriber monies by *Curtis* was an unfair practice. *Id.* at 1523 (Comm'n op.). They concluded that if the money was available, restitution would be the only remedy "that would effectively remedy the situation to protect the public interest." *Id.* (Comm'n op.). They were persuaded that the complaint should be dismissed, however, because *Curtis* was never in a position to pay refunds. *Id.* (Comm'n op.). Even if subscribers had been advised of their rights, they would not have been better off and, thus, *Curtis*' misrepresentation was not material. *See id.* (Comm'n op.) (noting that it may have been equally misleading for publisher to have offered unconditional refunds).

129. Commissioner Dixon, who wrote the opinion, had complained two years earlier that "administrative remedies, such as those presently provided in the Federal Trade Commission Act, are not adequate since they do not provide for recovery of individual losses." *Hearings on S. 2246, S. 3092, S. 3201 Before the Consumer Subcomm. of the Senate Comm. on Commerce*, 91st Cong., 2d Sess. 39 (1970). In *Curtis*, Commissioner Dixon conceded that "a literal reading" of the remedial provisions of section 5 indicates a narrower and more rigid application than he was then espousing. *Curtis Publishing*, 78 F.T.C. at 1512 (Comm'n op.).

130. *Curtis Publishing*, 78 F.T.C. at 1512-18 (Comm'n op.).

131. 327 U.S. 608 (1946).

will not interfere [with FTC cease and desist orders] except where the remedy selected has no reasonable relation to the unlawful practices found to exist."¹³² The opinion in *Curtis*, however, omitted reference to the preceding sentence: "The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed."¹³³ This was an important modifier because the FTC's primary objective is to eliminate deceptive or otherwise unfair trade practices from the market.¹³⁴ Similarly expansive opinions regarding the FTC's remedial power can be distinguished on the same ground that the relief allowed the FTC, while broader than a simple "don't do it," must be exercised to eliminate in the future the practices of the past.¹³⁵

Focusing on the administrative law judge's grounds for concluding that the FTC did not possess restitutionary authority diverts attention from the principal issue.¹³⁶ The question is not whether section 5 permits the imposition of affirmative duties or the awarding of money or "retroactive relief." Instead, it is whether the affirmative duty¹³⁷ or the award of money or retroactive relief¹³⁸ is

132. *Curtis Publishing*, 78 F.T.C. at 1513 (Comm'n op.) (citing *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 613 (1946)).

133. *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612 (1946).

134. *Id.* at 614 (stating that accomplishing that objective, FTC can appraise facts from particular cases and draw from its generalized experience).

135. *Cf. FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952) (recognizing that cease and desist orders are "not intended to impose punishment or exact compensatory damages for past acts but to prevent illegal practices in the future").

136. *See Curtis Publishing*, 78 F.T.C. at 1503-07 (initial decision) (concluding that FTC lacked jurisdiction to render necessary monetary judgement).

137. Although "cease and desist" has a negative connotation, it is not an untenable stretch of the statutory language to construe it as permitting a requirement that respondent perform affirmative acts if those acts are necessary to eliminate a particular practice. *See FTC v. Dean Foods Co.*, 384 U.S. 597, 606 n.4 (1966) (finding FTC orders may require divestitures). "Cease and desist" applies to the practice found to be unfair and deceptive, not to the permissible avenue for accomplishing that objective. *See Ruberoid*, 343 U.S. at 473 (finding FTC's orders are intended to prevent future illegal practices). Thus, where appropriate for ending an unfair or deceptive practice, courts have affirmed an FTC requirement that respondent engage in affirmative acts to bring about the cessation of conduct that violates the Act. *See, e.g., Warner-Lambert Co. v. FTC*, 562 F.2d 749, 762-64 (D.C. Cir. 1977) (ordering corrective advertising to correct years of misleading advertising), *cert. denied*, 435 U.S. 950 (1978); *American Cyanamid Co. v. FTC*, 363 F.2d 757, 771-72 (6th Cir. 1966) (holding compulsory licensing of patents is reasonable where substantive evidence indicates antitrust violations); *Ward Lab., Inc. v. FTC*, 276 F.2d 952, 955 (2d Cir.) (requiring affirmative disclosure when advertising is found to be deceptive or misleading), *cert. denied*, 364 U.S. 827 (1960); *Raymond Lee Org., Inc.*, 92 F.T.C. 489, 650-51 (1978) (requiring cooling-off period to allow customers to determine whether they want to continue with respondent's contract), *aff'd sub nom. Lee v. FTC*, 679 F.2d 905 (D.C. Cir. 1980).

138. *Curtis Publishing*, 78 F.T.C. at 1503-04 (initial decision). The actual question is whether the order is prospective in the sense that it is confined to those measures that are aimed at stopping known unlawful practices. *See Coro, Inc. v. FTC*, 338 F.2d 149, 153 (1st Cir. 1964) (holding that FTC only has power to require affirmative acts aimed at current unlawful practices and preventing their recurrence in future), *cert. denied*, 380 U.S. 954 (1965); *Standard Containers Mfrs. Ass'n v. FTC*, 119 F.2d 262, 266 (2d Cir. 1941) (finding that cease

reasonably related to the elimination of the offending practice in the future.¹³⁹ The FTC's remedial authority should be deemed to be only as broad as is appropriate to achieve that goal. Using this approach, the authority to order restitution to consumers injured by deceptive sales practices will usually fall outside the cease and desist penumbra.

Commissioner Dixon's *Curtis* opinion articulated two theories justifying restitution as consistent with the cease and desist authority of the Commission: restitution is justified when it is necessary to restore competition or when it is necessary to eliminate a continuing

and desist orders look to end current illegal practices and prevent future illegal conduct). If the remedy is not necessary to accomplish the remedial objectives of FTC orders, then it may be deemed to be "punitive" or "retroactive." *Curtis Publishing*, 78 F.T.C. at 1505 (initial decision) (citing *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952)) (finding purpose of FTC orders is to prevent future illegal practices rather than punish for past transgressions); *Amalgamated Workers v. Edison*, 309 U.S. 261, 268-69 (noting that Congress established FTC to protect public interest, not to provide remedial measures for private persons). The administrative law judge in *Curtis* asserted that an FTC remedy may not impose a penalty or award damages. See *Curtis Publishing*, 78 F.T.C. at 1506 (initial decision) (citing *Guziak v. FTC*, 361 F.2d 700, 703 (8th Cir. 1966), cert. denied, 385 U.S. 1007 (1967)) (finding purpose of FTC Act is prevention of potential injury resulting from unfair methods of competition); *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3d Cir. 1963) (noting that FTC remedies are not intended to punish wrongdoer); *Ford Motor Co. v. FTC*, 120 F.2d 175, 182 (6th Cir. 1941) (stating that FTC Act does not give Commission authority to grant compensatory relief). The FTC's opinion discounted the preceding line of cases on the ground that restitution is an equitable remedy to restore the status quo rather than a penalty or an award of damages. *Curtis Publishing*, 78 F.T.C. at 1518 (Comm'n op.) (finding that if public interest is served, restitution may be used to restore status quo). The FTC looked at cases that distinguish between "damages" and "restitution" because it found support for its position in statements that analogize its cease and desist authority to the equitable jurisdiction of courts. *Id.* at 1516-17 (Comm'n op.). Because restitution is an equitable remedy in which the public interest is served by forcing the return of unjust enrichment, and because the FTC's cease and desist authority is equitable in nature, the FTC argued that it must have the restitution authority. *Id.* at 1517 (Comm'n op.).

The focus should not be on how the relief is denominated, but on what it is designed to do. The fact that restitution is not a "penalty" does not place it, by that fact alone, within the FTC's remedial arsenal. The crucial distinction is whether awarding restitution is designed to remedy a past wrong or to prevent a future wrong. See *id.* at 1513-15 (Comm'n op.) (differentiating between prospective and retrospective relief). The award of money to identified or identifiable persons or entities is usually aimed at private relief rather than avoidance of future injury to unidentified members of the public. The FTC justified its award of private relief by stating: "[I]f adequate public interest grounds for granting restitution are present in a particular case, the benefit to private persons who may be restored to the *status quo ante* would be merely an incidental aspect of the Commission order." *Curtis Publishing*, 78 F.T.C. at 1518 (Comm'n op.). The statutory criteria for an FTC order, however, is not simply the public interest. Public interest is merely a criterion for issuing a complaint. See *FTC v. Klesner*, 280 U.S. 19, 21 (1929) (finding that before issuing complaint FTC must determine whether proceeding will be in public interest). The remedial language refers only to "cease and desist" orders and the legislative history is clear that this remedy was not to be coextensive with equity jurisdiction in the courts. See 83 CONG. REC. 391-414 (1938). But cf. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972) (noting that FTC acts like court of equity when it considers public values against standards of fairness).

139. *Curtis Publishing*, 78 F.T.C. at 1514 (Comm'n op.). The FTC's *Curtis* opinion expands the FTC Act's purpose to eradicate unfair or deceptive acts to include the dissipation of "any lingering effects of past violations." *Id.* (Comm'n op.). To the extent those "lingering effects" do not impact on future commerce, the FTC overstated the end to more easily justify its assertion of authority to order restitutionary relief.

violation of section 5.¹⁴⁰

1. *Restitution to restore competitive status quo*

The *Curtis* opinion asserted that deceptive conduct can impact future competition in the market by injuring ethical competitors, thus giving unethical participants an unfair financial advantage.¹⁴¹ The FTC stated that to the extent deception works to divert money from ethical competitors, it injures those competitors. To the extent this injury is found to have adversely altered the competitive dynamic of the marketplace, restitution of funds to consumers might be a way to restore the competitive balance that existed before the deception occurred.¹⁴² To justify such relief, however, there would have to be evidence not only of lost profits to ethical competitors, but a demonstrated impact on competition in the market.¹⁴³ In addition, the FTC would have to conclude that requiring restitution to be paid to consumers would somehow rectify injury to future competition.¹⁴⁴ Neither finding is likely in a deception case because injury to competition does not necessarily follow from a deceptive practice and because requiring proof of lost profits would turn every simple deception case into a prolonged antitrust inquiry. Ironically, the FTC invoked injury to competition to justify a remedy for unfair or deceptive acts or practices, a prohibition added to the FTC Act in 1938 to eliminate the need to prove injury to competition in deception cases.¹⁴⁵

The same predicates would have to underlie restitution when the focus is not on injury to competitors due to lost business, but on the advantage to the perpetrator of the deception. In exploring this approach, Commissioner Dixon quoted from a speech by Commissioner Jones who posited a situation where "businessmen employing such deceptive and unfair practices and reaping the profits therefrom can use those excess profits to drive out honest efficient businessmen who do not use them, and thus, severely injure the competitive structure of the affected market."¹⁴⁶ Under this ap-

140. *Curtis Publishing*, 78 F.T.C. at 1512-17 (Comm'n op.).

141. *Id.* at 1515 (Comm'n op.).

142. *Id.* (Comm'n op.).

143. See *FTC v. Radadam Co.*, 283 U.S. 643, 646-47 (1931) (stating that then-existing language of FTC Act required Commission to show that methods complained of were unfair and adversely affected competition, and that prevention of use of such methods was in public interest).

144. *Curtis Publishing*, 78 F.T.C. at 1515-16 (Comm'n op.) (stating that ordering restitutionary relief, although directed at past wrongs, may sometimes operate prospectively to restore competition).

145. See *supra* note 93 and accompanying text.

146. *Curtis Publishing*, 78 F.T.C. at 1515 (Comm'n op.).

proach, however, restitution would be an appropriate remedy only if the record showed: (1) the profits of the deceiver were somehow used to "drive out" the honest businessman; and (2) payment of restitution to consumers would restore the competitive vitality of the market to its predeception condition. If the "driving out" proof could be made, an extraordinarily difficult task, a better ground for a complaint would be section 5's "unfair methods of competition" prohibition, the FTC Act's equivalent to section 2 of the Sherman Act.¹⁴⁷ Furthermore, a remedy focusing on restoration of competition rather than on compensating deceived customers would be more appropriate. In *Curtis*, the FTC treated competitive injury as a pretext for rationalizing its order of consumer relief rather than as a condition to be addressed and rectified in its own right.¹⁴⁸

2. *Restitution to end a continuing violation*

The FTC relied on a second theory to justify the use of restitution in *Curtis*. Under this theory, the Commissioners considered the retention of money obtained through deception a continuing violation of section 5 that could only be cured by restitution.¹⁴⁹ This analysis also fails. The holding of money, regardless of its source, does not necessarily affect future conduct. Restitution for injured victims is designed to undo past violations rather than to prevent future bad conduct, the intended aim of the cease and desist power.¹⁵⁰ The FTC's approach confuses prohibited conduct with the effect of prohibited conduct. Retaining money from the sale of goods or services is not unfair by itself. The unfairness is only determined after analyzing how the money was obtained, which then becomes the unfair or deceptive act or practice.¹⁵¹

To hold that every unredressed law violation is a continuing one would eliminate any meaningful distinction between continuing and

147. Federal Trade Commission Act, § 5, 15 U.S.C. § 45 (1988); see Sherman Act, § 2, 15 U.S.C. § 2 (1988). Section 2 states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony" *Id.*

148. *Cf. Sebert*, *supra* note 14, at 246 n.95 ("[T]he possibility of competitive injury to competitors does not provide much of a basis for restitution to consumers.").

149. *Curtis Publishing*, 78 F.T.C. at 1516 (Comm'n op.).

150. *Cf. FTC v. Evans Prod. Co.*, 775 F.2d 1084, 1087 (9th Cir. 1985) (noting that to justify injunctive relief, violation must be ongoing or likely to recur).

151. See *Heater v. FTC*, 503 F.2d 321, 323 (9th Cir. 1974) (finding continuing unfairness in retaining ill-gotten gains is "not implausible construction" of FTC Act "as an abstract proposition," but rejecting it because FTC Act does not permit granting of private relief that such interpretation would allow). An analogy to divestiture orders in merger cases does not withstand analysis. See also *infra* notes 170-71 and accompanying text (discussing divestiture and procedures for disgorgement of profits).

noncontinuing violations. Every violation of the FTC Act, to the extent it produces a benefit for the perpetrator, would be deemed continuing, as long as the benefit is not somehow denied to the perpetrator.¹⁵² In a different context, the Supreme Court has held that a violation is "continuing" only where (1) both *the detrimental effect to the public* and the violator's realized gains continue *and increase* over a period of time, and (2) the violator possesses the ability to eliminate the effects of the violation if it so desires.¹⁵³ In most cases, a cessation of the deceptive practice is sufficient to eliminate the detrimental future effect on the general public, as opposed to the effect on identifiable victims of past practices. Accordingly, restitution becomes a remedy for past violations only and falls outside the objectives of the cease and desist remedy.

In enunciating the continuing violation theory, the FTC relied on precedent in which cease and desist orders required respondents in future transactions to refund money obtained or retained pursuant to some fraudulent or unfair scheme.¹⁵⁴ Certainly one way to deter future deception (taking money under false pretenses) is to require the restoration of such money. As a remedy applying to future conduct, restoration does not offend the principle that a cease and desist order should address future behavior. Such cease and desist provisions, however, do not support the proposition that retention of money derived from conduct prior to FTC intervention is itself a

152. Sebert, *supra* note 14, at 247. Professor Sebert views a continuing violation to exist for restitution purposes "in any case in which misrepresentations of the quality or characteristics of respondent's goods or services resulted in the payment by consumers of a price that substantially exceeded the value of the goods or services." *Id.* Under this formulation, he continues, "restitution could be considered a permissible remedy in a relatively significant portion of the Commission's deceptive practice cases." *Id.*; see also *Heater v. FTC*, 503 F.2d 321, 323 n.6 (9th Cir. 1974) ("[T]he FTC position [rejected by the court] supports restitution as an appropriate remedy in all cases.").

153. *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 231 (1975) (interpreting Federal Trade Commission Act, § 5(l), 15 U.S.C. § 45(l) (1988) and finding that Act authorizes daily penalties for order violations when there is "continuing failure or neglect to obey a final order of the Commission"). The Court found that the defendant's holding of a company acquired in violation of an FTC order prohibiting the acquisition constituted a continuing violation. *Id.* at 239-40. The conclusion is logical because an impact on competition occurs not only at the moment of the acquisition, but continues to affect *future* competition until undone. *Id.* at 242. That situation does not exist in the case of deceptive obtaining of money, because absent additional deceptive acts, retention of the money does not ordinarily affect future transactions in the marketplace.

154. *Curtis Publishing*, 78 F.T.C. at 1514-16 (Comm'n op.). Specifically, the *Curtis* decision relied on *Windsor Distrib. Co.*, 77 F.T.C. 204, 222 (1970) (ordering company to refund money in connection with any future unlawful practice), *aff'd*, 437 F.2d 443 (3d Cir. 1971) and *Interstate Home Equip. Co.*, 40 F.T.C. 260, 267-68 (1945) (requiring company in future to issue refunds where company refuses to complete sale or to return merchandise sent to company for repair). See also *Universal Elec. Corp.*, 78 F.T.C. 265, 296-97 (1971), *clarified on denial of reconsideration*, 78 F.T.C. 1576 (1971) (ordering corporation to refund all money to any purchaser who is induced to purchase product by conduct violating final FTC order).

continuing violation. Rather, retention of ill-gotten money derived from past conduct only falls within the cease and desist power in those rare cases where the retention affects the future competitive operation of a market, and the FTC establishes such a causal relationship.¹⁵⁵ In *Curtis*, the FTC failed to make a convincing case supporting its statutory authority to order restitution under its cease and desist power. In *Heater v. FTC*, the first appellate court decision to reach the question of the FTC's power to order restitution after its declaration that it possessed such power, the Ninth Circuit found the asserted authority lacking.¹⁵⁶

C. The Heater Case: Judicial Rejection of the FTC's Interpretation of the "Cease and Desist" Power

1. Proceedings Before the Federal Trade Commission

In 1973, the FTC issued a cease and desist order to a company and its officers that had offered memberships in a "universal credit card plan" to retailers.¹⁵⁷ Under the plan, the retailer could honor all major credit cards submitted by its customers and submit the charges to receive payment from the plan within thirty days, regardless of the customers' payment.¹⁵⁸ The plan appealed to merchants because it required contracting with only one plan while enabling the merchant to honor most credit cards, and because it offered the store prompt payment regardless of a customer's default.¹⁵⁹ An administrative law judge found that the company did not honor the commitment to pay the merchant regardless of the customer's default and that it was late in paying the merchants.¹⁶⁰ Most merchants who signed up for the plan dropped it within several months, notwithstanding their one-year memberships.¹⁶¹ The administrative law judge also found that the company misrepresented the ease of selling and potential profits of the plan to the interested franchisees who marketed the plan to merchants.¹⁶² The judge's initial decision ordered the company to cease and desist its deceptive practices and, although skeptical of the FTC's position that it had

155. See *Curtis Publishing*, 78 F.T.C. at 1504-05 (initial decision) (finding FTC has authority to issue orders that have prospective effect only); see also *FTC v. Cement Inst.*, 333 U.S. 683, 706 (1948) (noting that FTC authority rests in its ability to prohibit specific future practices).

156. *Heater v. FTC*, 503 F.2d 321, 325 (9th Cir. 1974).

157. *Universal Credit Acceptance Corp.*, 82 F.T.C. 570, 646 (1973), *rev'd sub nom. Heater v. FTC*, 503 F.2d 321 (9th Cir. 1974).

158. *Id.* at 583.

159. *Id.*

160. *Id.* at 583, 618-19.

161. See *id.* (noting that many merchants cut their losses and ended their relationship with company after eight months).

162. See *id.* at 593-601 (finding misrepresentation of profit expectations and selling ease).

the power to order refunds, followed the *Curtis* holding and ordered the payment of refunds to defrauded merchants and franchisees.¹⁶³

On appeal to the FTC, the only dispute concerned the authority of the FTC to order the payment of refunds.¹⁶⁴ The Commission reaffirmed the propriety of a restitution order under its cease and desist authority on the ground that it was "essential in this case in order to redress the competitive balance disrupted by respondents' fraudulent program and prevent repetition of these practices in the future."¹⁶⁵

The Commission concluded that a traditional cease and desist order would be an inadequate remedy "if that businessman who has engaged in the deceptive or unfair practices has been so successful as to significantly disrupt the balance of competition."¹⁶⁶ Yet, the evidence in this case indicated that the respondent company was in bankruptcy and that most of those merchants persuaded to join respondents' plan quit before their one-year membership expired.¹⁶⁷ From this record it was impossible to conclude that the company had any significant impact on the "competitive balance" with other credit card issuers such as VISA and Mastercard franchisees. Certainly the FTC proffered nothing to suggest that the plan would continue to impact that market's "competitive balance."

Competitive analysis in deception cases can be odd. For instance, in what market does a quick cure for cancer compete? If the market includes radiation therapy and chemotherapy, the market impact of a magic elixir will be minimal. If the market is confined to quickie cures, is that a market where competition should be encouraged? Even where fraud exists in a legitimate market, as was the case in *Heater*, it usually operates on the periphery, skimming off money from a gullible few but rarely successful enough in the long run to work a change in the competitive dynamic of the market as a whole.

To buttress its argument, the FTC also asserted that "if the businessman is permitted to retain substantial funds obtained as a result of deception or fraud, the consuming public will have been deprived of the opportunity to place these funds in legitimate competitive activities and the businessman will be able to utilize these funds for further ventures."¹⁶⁸ According to the FTC, this would be similar

163. *Id.* at 634. The case is referred to as the "*Heater* case" after the name of the individual respondent who appealed and won in the Ninth Circuit. *Heater v. FTC*, 503 F.2d 321 (9th Cir. 1974).

164. *See Universal Credit*, 82 F.T.C. at 646.

165. *Id.* at 654.

166. *Id.* at 652.

167. *See id.* at 657-59 (noting bankruptcy of company).

168. *Id.* at 652.

to the retention of a company acquired in violation of the Clayton Act's prohibition of acquisitions and mergers that tend to substantially lessen competition.¹⁶⁹ The analogy misses a crucial difference. Divestiture is not ordered to prevent the perpetrator of the act from enjoying the fruits of illegal conduct. Rather, it is ordered to correct the distortion in market structure that adversely impacted competition when the merger occurred and that, until undone, will continue to adversely impact competition in future transactions.¹⁷⁰ Because the merger has a prospective effect on competition, a cease and desist order to eliminate it using the divestiture mechanism is appropriate.¹⁷¹ Conversely, in the case of money obtained by fraud, there is no evidence that the perpetrator's retention of the money will have a continuing effect on the future state of competition. The fact that the defrauded consumer has lost money he or she might otherwise have spent with a legitimate enterprise does not, without some proof, suggest that there will be a lingering market dislocation. For instance, the merchants who left the Universal Plan would still sign up with another company out of competitive necessity, writing off the investment in the fraudulent product as a business expense.

The FTC suggested an alternative ground for the necessity of a restitutionary order; it concluded that a "go-and-sin-no-more" order would be ineffective against people who engage in blatant fraud in the face of the FTC Act's general prohibition of such activity.¹⁷² Only if such people were reasonably sure that they would have to give up ill-gotten gains would there be a sufficient deterrent effect

169. See *id.* (noting that where competitive balance is upset, divestiture is appropriate remedy).

170. A closer analogy would exist if, in addition to divestiture, an FTC order required the disgorgement of any profits made by the company during the time it possessed the illegally acquired company. The FTC has declined to take a position on whether it has that authority. *Liggett & Myers Inc.*, 87 F.T.C. 1074, 1182-83 (1976) (finding that issue was not ripe for FTC consideration), *aff'd on other grounds sub nom. Liggett & Myers Inc. v. FTC*, 567 F.2d 1273 (4th Cir. 1977). But cf. *Beatrice Foods Co.*, 101 F.T.C. 733, 795 (1980) (initial decision) (holding that FTC has authority to order divestiture and disgorgement of profits made from illegally acquired company), *complaint dismissed*, 101 F.T.C. 733, 797 (1983); *American Gen. Ins. Co.*, 89 F.T.C. 557, 646 (1977) (implying FTC can order divestiture of dividends received by acquiring company from acquired company, but declining to do so), *rev'd on other grounds sub nom. American Gen. Ins. Co. v. FTC*, 589 F.2d 462 (9th Cir. 1979), *dismissed*, 97 F.T.C. 339, 342 (1981) (declining to order profits divestiture for lack of support in record demonstrating injury to acquired company).

171. Cf. *California v. American Stores Co.*, 495 U.S. 271, 285 n.11 (1990) (finding that continuing ownership of stock unlawfully acquired is continuing violation of Clayton Act). Professor Sebert makes no distinction between specific injury to identifiable individuals arising from past transactions and the speculative unquantified injury to future competition in merger cases in concluding that the FTC's power to order divestiture in merger cases "provides some of the strongest support for the view that a restitution order in a case such as *Curtis* is authorized and is not improperly 'retrospective.'" Sebert, *supra* note 14, at 240.

172. *Universal Credit*, 82 F.T.C. at 652-53.

against the hard core defrauder. This argument, however, ignores the fact that Congress considered the same criticism of cease and desist orders during the congressional debate of the FTC Act's remedial provisions in 1914.¹⁷³ Despite those objections, Congress only adopted the cease and desist remedy for the FTC. In light of this history, it is untenable to take the position that the cease and desist authority contains an implied restitutionary element as a deterrent factor. If a deterrent factor is desirable as a policy matter (and it is difficult to argue against that proposition) it is a matter for Congress to address through legislation rather than for the FTC or the courts to effect through creative statutory interpretation.

Lack of restitutionary authority does not emasculate the FTC. The FTC is not prevented from entering broad orders to prevent future conduct related to the type found to have occurred in the past.¹⁷⁴ Indeed, the FTC Act establishes procedures for penalties and contempt charges if the respondent violates that order.¹⁷⁵ Although the prospect of a restitutionary order might make an FTC respondent less willing to engage in the prohibited conduct in the first place, Congress did not authorize such a scheme in passing the FTC legislation. In seeking to create a blank check out of its cease and desist remedial authority in *Curtis* and *Heater*, the FTC overreached.¹⁷⁶

2. *The appeal to the Ninth Circuit*

One of the individuals against whom the restitutionary order in

173. See *supra* notes 52-54 (discussing ineffectiveness of cease and desist order to remedy wrongs committed before order's issuance).

174. See *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952) ("[The FTC] must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity."); see also *Amrep Corp. v. FTC*, 768 F.2d 1171, 1180 (10th Cir. 1985) (concluding that FTC is not prevented from prohibiting future enforcement of existing illegal contracts), *cert. denied*, 475 U.S. 1034 (1986).

175. Federal Trade Commission Act, § 5(l), 15 U.S.C. § 45(l) (1988). The penalty provision states:

Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than \$10,000 for each violation. . . . Each separate violation of such an order shall be a separate offense except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

Id.

176. It would have been within the FTC's authority to meet the deterrence objective by requiring that if such activity were to occur in the future, restitution would have to be made. See *Windsor Distrib. Co.*, 77 F.T.C. 204 (1970), *aff'd sub nom. Windsor Distrib. Co. v. FTC*, 437 F.2d 443 (3d Cir. 1971).

Heater was issued appealed to the Court of Appeals for the Ninth Circuit.¹⁷⁷ In a relatively brief opinion, the court held that the FTC's remedial authority does not include the power to order restitution.¹⁷⁸ The court reasoned that the broad prohibition against "unfair or deceptive acts or practices" contained in the FTC Act left to the FTC not only an enforcement responsibility but also a definitional responsibility.¹⁷⁹ Thus, whether certain conduct is "unfair or deceptive" may not be known for certain until the FTC so defines it.¹⁸⁰ The Ninth Circuit reasoned that it would be unfair to allow the FTC to order restitution for conduct that became illegal only after the FTC declared it illegal.¹⁸¹ The fact that this argument might not apply to obvious fraud is a distinction that Congress did not make in the FTC Act.¹⁸² The court indicated that the inability of the FTC to order restitutionary relief does not prevent private suits where the conduct violates established legal norms.¹⁸³

Thus, in 1974, a federal appellate court judicially declared that the FTC did not possess the restitutionary power that it had been asserting for over two years. Although the FTC disagreed with the *Heater* decision and considered seeking Supreme Court review,¹⁸⁴ legislative developments overtook judicial review. The FTC decided to defer seeking judicial resolution of its cease and desist authority¹⁸⁵ and looked instead to the expanded restitutionary authority given to it by Congress in the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975.¹⁸⁶ Little did the FTC realize, however, that two years prior to the *Heater* decision, Congress had given it other authority which the courts would later construe as significantly broader than the statutory authority on which the FTC decided to rely.¹⁸⁷

177. *Heater v. FTC*, 503 F.2d 321, 321 (9th Cir. 1974).

178. *Id.* at 326-27.

179. *Id.* at 324-25.

180. *See id.* at 323 (stating that certain acts only become illegal after FTC specifically declares them to be illegal).

181. *See id.* at 325 (noting that Congress did not intend to give FTC power to "recast consequences of conduct occurring prior to its entry of final order").

182. *See id.* at 326 (finding that if Congress wanted to grant FTC power to order restitution in fraud cases it would have done so explicitly).

183. *See id.* at 325 n.15 (recognizing that common law remedies are available for especially egregious conduct).

184. *See Holiday Magic, Inc.*, 84 F.T.C. 748, 1045 n.11 (1974) (calling *Heater* decision "incorrect" and stating FTC's intention to seek Supreme Court review).

185. *See Holiday Magic, Inc.*, 85 F.T.C. 90, 90-91 (1975) (announcing decision not to file for certiorari in *Heater*).

186. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, § 201, Pub. L. No. 93-637, 88 Stat. 2183, 2193 (1975).

187. *See infra* notes 188-99 and accompanying text (discussing Trans-Alaska Pipeline Act, tit. IV, § 408, Pub. L. No. 93-153, 87 Stat. 576 (1973)).

II. LEGISLATIVE APPROACHES TO CONSUMER REDRESS

Notwithstanding the FTC's assertion of its own authority to order consumer redress, the FTC also sought statutory enhancement of its remedial powers from Congress, including the power to order restitution.¹⁸⁸ The FTC sought expanded remedial options to more effectively accomplish its mission of promoting competition and protecting consumers.¹⁸⁹ As a result, Congress passed two pieces of legislation in the 1970s amending the FTC Act. The first was the Trans-Alaska Pipeline Act,¹⁹⁰ followed by the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act.¹⁹¹

A. *The Trans-Alaska Pipeline Act Amendments: Section 13(b)
Injunctive Relief*

In 1973, Congress passed the Trans-Alaska Pipeline Act in response to a national energy crisis created by a shortage of domestic crude oil.¹⁹² Opening up the reserves on the Alaskan North Slope was seen as a critical step to achieving "energy independence" for the United States.¹⁹³ As a result, Congress passed legislation that allowed construction of a pipeline from the North Slope to a port in southern Alaska. During Senate debate, Senator Jackson introduced and the Senate accepted a floor amendment that, on its face, modestly increased the FTC's enforcement powers. Passage of the bill, with the Jackson amendment, added section 13(b) to the FTC Act.¹⁹⁴ This section empowers the FTC, whenever it believes that someone is violating or is about to violate any of the laws enforced by the FTC, to sue in district court to enjoin the practice pending issuance of an FTC complaint and final resolution of that action.¹⁹⁵

188. See S. REP. NO. 151, 93d Cong., 1st Sess. 9 (1973) (accompanying S. 356) (referencing 1970 testimony of Commissioner Elman complaining that "no recovery of damages may be had under the FTC Act even when they result from unfair and deceptive practices" and Commissioner Jones' statement that "what we need are stronger sanctions"); see also *supra* note 129 (testimony of then-Chairman Dixon) (discussing Dixon's dissatisfaction with current FTC remedies).

189. *Id.*

190. Trans-Alaska Pipeline Act, Pub. L. No. 93-153, 87 Stat. 576 (1973) (amending 15 U.S.C. §§ 45-46, 53, 56 (1988)).

191. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183, 2193 (1975).

192. Trans-Alaska Pipeline Act, Pub. L. No. 93-153, 87 Stat. 576 (1973).

193. See MESSAGE FROM PRESIDENT NIXON, H.R. DOC. NO. 187, 93d Cong., 2d Sess. 1-4 (1973), reprinted in 119 CONG. REC. 36,620-22 (1973) (calling Congress to move nation toward energy self-sufficiency).

194. See 119 CONG. REC. 36,594, 36,622 (1973) (passing pipeline legislation).

195. Federal Trade Commission Act, § 13(b), 15 U.S.C. § 53(b) (1988); see 119 CONG. REC. 22,980 (1973) (statement of Sen. Jackson) (noting that amendment will allow FTC to seek subpoena enforcement and injunctive relief in federal district courts). In the first session of the 93rd Congress, a bill had been introduced in the Senate addressing the same problem.

In addition, the provision states that "in proper cases the Commission may seek, and after proper proof the court may issue, a permanent injunction."¹⁹⁶

At the time, the FTC viewed this legislation as a "gap-filler." Congress designed this legislation to eliminate the long-recognized deficiency in FTC enforcement power that allowed respondents to carry on their activities until FTC issuance of a final cease and desist order, regardless of the injury the activities might be causing.¹⁹⁷

See S. 356, 93d Cong., 1st Sess. (1973). That bill later became the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975. That bill, however, would have limited preliminary injunctive relief only to cases involving "unfair or deceptive practices" and would not have applied to cases involving unfair methods of competition.

Senator Jackson also introduced a bill in the Senate to meet the FTC's request for injunctive authority applicable to all its cases and enforcement of its own subpoenas in court. See S. 2074, 93d Cong., 1st Sess. (1973), introduced at 119 CONG. REC. 21,443 (1973). Before his bill could be considered in committee and reported to the Senate, however, Senator Jackson proposed it on the floor as an amendment to the Trans-Alaska pipeline legislation then being debated by the Senate. See *id.* at 22,978 (amending S. 1081, 93d Cong., 1st Sess. (1973)). It was adopted without debate. See 119 CONG. REC. 22,981 (1973) (adopting amendment by vote of 78-11). The House substituted its own version of the Trans-Alaska Pipeline Act which stripped out the FTC amendments. See H.R. 9130, 93d Cong., 1st Sess. (1973). In conference between the houses on their differing provisions, the FTC amendments were reinserted. See H.R. CONF. REP. NO. 624, 93d Cong., 1st Sess. 16-20 (1973). Both houses passed the conference version and President Nixon signed it into law, notwithstanding his reservations about the FTC amendments. Trans-Alaska Pipeline Act, § 408, Pub. L. No. 93-153, 87 Stat. 576, 591 (1973) (adding Federal Trade Commission Act, § 13(b), 15 U.S.C. § 53(b) (1988)); see also 6 KINTNER, *supra* note 27, at 4992 (reprinting President Nixon's signing statement). In his statement, the President noted that he was signing the legislation even though it contained a "few clinkers." *Id.*

196. Federal Trade Commission Act, § 13(b), 15 U.S.C. § 53(b) (1988). Section 13(b) reads in full:

Whenever the Commission has reason to believe—

- (1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
- (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided, however,* That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further,* That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

Id.

197. See Letter from Lewis A. Engman, Chairman, Federal Trade Commission, to Rep. Harold T. Johnson (Nov. 9, 1973), reprinted in 119 CONG. REC. 36,610 (1973) (writing that bill enhances FTC's effectiveness without increasing its jurisdiction). In introducing his amendment, Senator Jackson stated that a shortcoming of the Federal Trade Commission was its lack of authority to obtain preliminary injunctive relief. 119 CONG. REC. 22,979-80 (1973)(re-

The statutory provision adopted by the conference committee declared that its purpose was to ensure "prompt enforcement" of the laws for which Congress had given the FTC enforcement authority.¹⁹⁸ In the House, where the principal debate on the Senate amendment occurred, Representative Smith argued: "It is only good sense that where there is a probability that the act will eventually be found illegal and the perpetrator ordered to cease, that some method be available to protect innocent third parties while the litigation winds its way through final decision."¹⁹⁹ Representative

marks of Sen. Jackson). In fact, those who voted for the original FTC Act noted this deficiency in 1914. See *supra* note 51 (discussing inherent weakness of cease and desist order).

198. See Trans-Alaska Pipeline Act, tit. IV, § 408, Pub. L. No. 93-153, 87 Stat. 576, 591 (1973) (noting that inability to enforce subpoenas or seek preliminary injunctions restricts FTC in performing its investigative and law enforcement function). Congressional intent about the FTC amendment is sketchy. This reflects the procedural shortcut taken by Senator Jackson in introducing it as a floor amendment to legislation dealing with another subject of significant national concern. Several representatives complained about the inadequate attention that was given to the FTC proposal. See 119 CONG. REC. 36,600 (1973) (remarks of Rep. Hosmer) (commenting that Senate did not give proposal necessary attention); *id.* (remarks of Rep. Steiger) (noting that Senate passed bill without hearings or knowledge of language contained in bill). The Senate also echoed this view. See *id.* (remarks of Sen. Fanin) ("I do not think very many Senators were observant of just exactly what was involved when they voted on the FTC regulation amendment.").

199. 119 CONG. REC. 36,609 (1973) (remarks of Rep. Smith). Of course, if the FTC had possessed authority to provide redress for injury occurring during the litigation period, the need for preliminary injunctive relief would not have been so pressing.

At the time Senator Jackson added his amendment to the Trans-Alaska pipeline bill, another piece of legislation, enabling the FTC to seek preliminary injunctions in instances of unfair or deceptive acts or practices, was pending before Congress. See S. 356, 93d Cong., 1st Sess. (1973), reprinted in 119 CONG. REC. 29, 492-94 (1973). While that bill was pending in committee, legislation concerning the Alaska pipeline was moving rapidly through Congress, which was focusing on the energy crisis. Senator Jackson, Chairman of the Senate Committee on Interior and Insular Affairs, requested that the FTC provide a report on the relationship between the structure of the petroleum industry and the shortages of petroleum products being experienced. See Letter from Sen. Henry M. Jackson to Lewis A. Engman, Chairman, Federal Trade Commission, reprinted in 119 CONG. REC. 21,444-45 (1973). In discussions with the FTC about that report, Jackson's staff became concerned about the ability and authority of the FTC to deal with situations comparable to "the current petroleum emergency." See 119 CONG. REC. 21,443 (1973) (remarks of Sen. Jackson) (referring to discussion with staff members). In response to this concern, the FTC's general counsel wrote to Senator Jackson, stating that the FTC's investigative authority seemed to be adequate but that the FTC's enforcement authority was hampered because it was not able to go into court to enforce its own subpoenas or to obtain preliminary injunctive relief during the pendency of FTC administrative litigation. See Letter from Ronald M. Dietrich, General Counsel, Federal Trade Commission, to Sen. Henry M. Jackson, reprinted in 119 CONG. REC. 21,445 (1973) (writing that FTC should be granted power to seek injunctions on cases involving deceptive practices and cases where anticompetitive conduct is shown). The pending bill regarding court injunctions was noted, but the FTC believed that it should include all matters over which the FTC had enforcement authority and not just consumer protection cases. See *id.* (recommending that FTC be granted power to seek injunctions whenever it deems necessary). The FTC urged Senator Jackson to expand that authority to include unfair methods of competition. *Id.*, reprinted in 119 CONG. REC. 21,445 (1973).

The preliminary injunction provision, first proposed as separate legislation by Senator Jackson and then adopted as a floor amendment to the Trans-Alaska Pipeline Act, was attractive to members of Congress who had received numerous complaints from independent refiners and marketers of petroleum products complaining that the major integrated oil companies

Melcher explained that the amendment removed "the procedural roadblocks that hamper the FTC in acting in a quick and effective manner."²⁰⁰

Legislators designed the new section 13(b) to help those injured by prohibited practices during the pendency of an administrative action. Section 13(b) was viewed also as a deterrent to those who might otherwise drag their feet in the administrative proceeding or to those tempted to engage in fraudulent conduct with the expectation that they could benefit while administrative proceedings were pending and then vanish.²⁰¹

Observers have analogized section 13(b) to the authority given to the Department of Justice to seek preliminary injunctions under the Sherman and Clayton Acts and the authority of the FTC to seek injunctions for false advertising of food, drugs, devices, and cosmetics under the Wheeler-Lea amendments.²⁰² Despite surface similarities

had deprived them of supplies and were putting them out of business. See 119 CONG. REC. 21,443 (1973) (remarks of Sen. Jackson) (noting numerous complaints that major petroleum companies were deliberately trying to destroy independent refiners and marketers to gain exclusive control over petroleum market). The FTC asserted that it was powerless to act to bring relief in the short term because it only had authority to grant relief at the conclusion of administrative proceedings. See Letter from Lewis A. Engman, Chairman, Federal Trade Commission, to Rep. Harold T. Johnson (Nov. 9, 1973), *reprinted in* 119 CONG. REC. 36,610 (1973). Some members of Congress believed that giving the FTC preliminary injunction authority would allow it to rectify alleged competitive problems at an early stage and limit the harm to small businesses. See 119 CONG. REC. 36,597 (1973) (remarks of Rep. Melcher) (stating that FTC needs to react quickly to save small businesses); *id.* at 36,608 (remarks of Rep. Smith) (noting that FTC needs injunctive powers to provide immediate remedy in extreme cases). This was a mistaken perception. Other than in merger cases, antitrust complaints seldom lend themselves to quick resolution or confident predictions of outcome from the beginning. Cf. Robert D. Paul, *The FTC's Increased Reliance on Section 13(b) in Court Litigation*, 57 ANTITRUST L.J. 141, 146 (1988) (discussing use of section 13(b) in merger cases and noting lack of use in antitrust cases). The FTC has not used its preliminary injunction authority in competition cases other than mergers. Responding to the concerns mentioned by legislators during the Trans-Alaska Pipeline Act debate, the FTC issued an administrative complaint against the major integrated oil companies in the summer of 1973. See *Exxon Corp.*, 98 F.T.C. 453, 454-59 (1981) (compl.) (alleging major oil companies have maintained monopoly power and noncompetitive market structure). That proceeding was an expensive burden to the FTC until it finally conceded that its action was unmanageable and dismissed the complaint in 1983. *Id.* at 460-61 (stating that lack of progress warranted dismissal).

200. 119 CONG. REC. 36,597 (1973) (remarks of Rep. Melcher); see also *id.* at 36,610 (remarks of Rep. Johnson) (stating that amendment gives FTC power to enforce its subpoenas through its own attorneys and to obtain preliminary injunctions from courts).

201. *Id.* at 36,609 (remarks of Rep. Smith) ("The possibility of injunction should give serious second thoughts to those who plan a quick 'killing' and withdrawal before retribution occurs."); *id.* at 36,610 (remarks of Rep. Johnson) (noting injunction has dual advantage of providing due process to FTC respondent and eliminating incentive for action taken for purposes of delay).

202. For the relevant provisions see Sherman Act, § 4, 15 U.S.C. § 4 (1988); Clayton Antitrust Act, § 15, 15 U.S.C. § 25 (1988); Federal Trade Commission Act, § 13(a), 15 U.S.C. § 53(a) (1988); see also Letter from Lewis A. Engman, Chairman, Federal Trade Commission, to Rep. Harold T. Johnson (Nov. 9, 1973), *reprinted in* 119 CONG. REC. 36,610 (1973) (noting similarities in authorities of FTC and Department of Justice); cf. H.R. CONF. REP. NO. 624, 93d Cong., 1st Sess. 31 (1973), *reprinted in* 1199 CONG. REC. 36,242 (1973) (observing standard of

between these provisions, this analogy fails. The Government has not sought or obtained restitution for those injured by the conduct for which the injunction is sought under either of the antitrust statutory provisions. Furthermore, the FTC's injunctive power relating to food, drugs, devices, and cosmetics does not include permanent relief. Finally, a private cause of action for antitrust violations is available under a separate section of the Clayton Act.²⁰³

With regard to the preliminary relief provision (as opposed to the permanent relief provision) of the Trans-Alaska Pipeline Act, the legislative history does not suggest that Congress expected that provision to authorize the awarding of restitution to those injured. Its purpose was simply to avoid future injury once the FTC had, by the issuance of a complaint, blown the whistle on suspect conduct.²⁰⁴ But section 13(b) also included a proviso that allowed the court "in proper cases" and "after proper proof" to enter permanent injunctions.²⁰⁵ There was no discussion of this clause during the debate on the Trans-Alaska Pipeline Act, nor did any such discussion appear in any of the committee reports on the legislation. Its purpose, however, can be discerned from the Senate committee report on the bill from which Senator Jackson extracted this provision for his floor amendment to the pipeline bill.²⁰⁶

The Senate committee report attributed two purposes to the permanent injunction language. The first purpose was to overcome possible judicial reluctance to enter preliminary relief without maintaining control over the timetable for permanent relief.²⁰⁷ This does not suggest that in granting courts the authority to issue permanent injunctions, Congress intended to grant district judges remedial power exceeding that of the FTC.

proof to be met by FTC to issue injunctions is "public interest" standard rather than more stringent equity standard that private litigants are subject to under common law).

203. Clayton Antitrust Act, § 4, 15 U.S.C. § 15 (1988); see *supra* notes 50-59 and accompanying text (discussing private cause of action under Clayton Act).

204. See Letter from Lewis A. Engman, Chairman, Federal Trade Commission, to Rep. Harold T. Johnson (Nov. 11, 1973), reprinted in 119 CONG. REC. 36,610 (1973) (report of Conference Committee) (observing that section 13(b) would authorize FTC to seek temporary injunctions to prevent continuation of "particularly aggravated violations of the laws" pending completion of time-consuming administrative procedure necessary for final cease and desist order).

205. Federal Trade Commission Act, § 13(b), 15 U.S.C. § 53(b)(2) (1988).

206. REPORT OF THE SENATE COMM. ON COMMERCE, S. REP. NO. 151, 93d Cong., 1st Sess. 8-11 (1973) (accompanying S. 356) (explaining history of bill).

207. *Id.* at 30-31 (1973). The report states:

This will allow the Commission to seek a permanent injunction when a court is reluctant to grant a temporary injunction because it cannot be assured of a [sic] early hearing on the merits. Since a permanent injunction could only be granted after such a hearing, this will assure the court of the ability to set a definite hearing date.

Id.

The second objective appears to have been the achievement of efficiency and expedition in routine fraud cases. The report stated that permanent injunctive relief would be appropriate for the district judge to grant in those instances involving "routine fraud" and where the expertise of the FTC to determine or define deceptiveness would not be necessary.²⁰⁸ Again, this second objective does not suggest that the committee contemplated that the district judge would be able to grant relief for violations of the FTC Act that differed from the remedies available to the FTC itself.²⁰⁹

In fact, after passage of the pipeline bill, the FTC's resort to use of its newly gained section 13(b) injunctive power languished, except in merger cases, to the point that a General Accounting Office report criticized the FTC for its failure to take advantage of it.²¹⁰ After the passage of the pipeline bill, the FTC, which appeared to have instigated this amendment, exhibited no sign that it believed Congress had given it any new authority to obtain consumer redress through the equitable intervention of the district courts. Instead, it continued in its efforts to find such power for itself through a strained interpretation of its own enabling act.²¹¹ Nor did Congress contemplate the potential for consumer redress in the injunction legislation. The same Congress that passed the Trans-Alaska Pipeline Act in 1973 with the FTC injunction provision continued to work on another bill that specifically addressed the consumer redress issue.

*B. The Magnuson-Moss Warranty—Federal Trade Commission
Improvement Act: Congress Provides an Express Means of
Consumer Redress*

The injunction provision of the 1973 Trans-Alaska Pipeline Act was lifted from another bill pending in the Senate that proposed a number of other changes in the FTC Act. One of the proposals was

208. *Id.* at 31. The report states:

Furthermore, the Commission will have the ability, in the routine fraud case, to merely seek a permanent injunction in those situations in which it does not desire to further expand upon the prohibitions of the Federal Trade Commission Act through the issuance of a cease and desist order. Commission resources will be better utilized, and cases can be disposed of more efficiently.

Id.

209. *Id.* Although Congress might have felt comfortable in giving the court such power because it would not be playing the "definitional" role assigned to the FTC, the legislative history does not indicate that Congress intended or even considered such a result.

210. Letter from Gregory J. Ahart, Director, U.S. General Accounting Office to Michael Pertschuk, Chairman, Federal Trade Commission (undated), reported in 889 Antitrust & Trade Reg. Rep. (BNA) A-24, F-1 (Nov. 16, 1978).

211. See *supra* notes 122-56 and accompanying text.

to give the FTC the power to seek from the courts redress for injured consumers.²¹² In 1974, the same Congress that proposed the Trans-Alaska Pipeline Act enacted provisions of that other Senate bill, including a consumer redress provision adding section 19 to the FTC Act, as Title II of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act.²¹³ Given the common percentage of the injunction provision and the consumer redress provision, they should be construed *in pari materia*, notwithstanding their eventual enactment in different pieces of legislation.²¹⁴

The section 19 consumer redress provision in the Magnuson-Moss legislation had an antecedent that failed to make it through the previous Congress. In the 92d Congress, the Senate had considered Senate Bill 986, which dealt with consumer warranties and FTC improvements.²¹⁵ Section 203 of that bill, as reported out of the Senate Commerce Committee, allowed the FTC to obtain redress from the courts for consumer injury flowing from unfair or deceptive acts or practices that are the subject of an FTC cease and desist order.²¹⁶ During Senate debate, Republicans sought to detach the FTC improvements title and pass the warranty legislation alone.²¹⁷ Basing their attack against the FTC section on inadequate committee consideration, the opponents sought to highlight the ambiguities and deficiencies of the FTC title. One deficiency repeatedly mentioned was that the redress provision contained no statute of limitations.²¹⁸ Another perceived deficiency was the possibility of a seller being sued for redress for activity that only became "unfair or deceptive" after the FTC defined it to be so with the entry of a

212. See S. 356, § 203, 93d Cong., 1st Sess. 24-25 (1973); see also *supra* note 195 (explaining history of bill).

213. Pub. L. No. 93-637, tit. 11, 88 Stat. 2183, 2193 (1975) (codified at 15 U.S.C. § 57b (1988)).

214. See *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 720 (5th Cir. 1982) (concerning injunction and consumer redress provisions, "Congress was evolving a statutory plan for the protection of the . . . public"); cf. *SEC v. Keller Corp.*, 323 F.2d 397, 403 (7th Cir. 1963) (construing sections of Investment Company Act as reflecting "statutory plan" to give district court statutory power as well as inherent equitable power to protect investing public); *Larimore v. Comptroller of the Currency*, 789 F.2d 1244, 1251-52 (7th Cir. 1986) (finding that statutory cease and desist power does not include power to require bank director to reimburse bank for unsafe loans when statute contains separate provision requiring federal court proceeding to impose personal liability on director).

215. S. 986, 92d Cong., 1st Sess. (1971).

216. *Id.* § 203.

217. 117 CONG. REC. 39,617 (1971) (remarks of Sen. Hruska) (arguing that reasons to bifurcate into two sections included different subject matter and separate committee jurisdictions).

218. *Id.* at 39,620 (remarks of Sen. Cook); *id.* at 39,621, 39,827, 39,857 (remarks of Sen. Hruska); *id.* at 39,626 (remarks of Sen. Dole).

cease and desist order.²¹⁹

Responding to the statute of limitations criticism, Senator Spong, a supporter of the bill, offered an amendment accepted by the bill's sponsor, Senator Magnuson, to include what he called a statute of limitations.²²⁰ His cure was illusory. The two-year limit offered by Senator Spong applied to the time within which the FTC could file a redress action after entry of a final cease and desist order, rather than to the time from the occurrence of the offending act to the filing of the redress action. The bill, with the Spong amendment, passed the Senate but died in the House when the 92d Congress expired.²²¹

In the 93d Congress, supporters in the Senate reintroduced the warranties/FTC bill, including the redress measure and its illusory two-year statute of limitations.²²² The Senate passed the measure with little debate.²²³ The companion House bill came out of the House Commerce Committee, however, without a consumer redress provision.²²⁴ A floor amendment proposed during House debate raised again the consumer redress issue.²²⁵ Unlike the Senate provision, the amendment proposed by Representative Eckhardt was limited to redress of violations of FTC trade regulation rules (where the perpetrator could not argue ignorance of the unlawfulness of the activity) and contained a six-year statute of limitations beginning with the date of the rule violation.²²⁶ This lengthy statutory period

219. *Id.* at 39,849 (colloquy between Sens. Hruska, Magnuson, and Cook); *id.* at 39,855, 39,861 (remarks of Sen. Cook); *id.* at 39,856 (remarks of Sen. Hruska).

220. *Id.* at 39,865 (remarks of Sen. Spong).

221. 117 CONG. REC. 39,876 (1971) (passing in Senate by vote of 76-2).

222. S. 356, 93d Cong., 1st Sess. § 203 (1973) (introduced Jan. 12, 1973); see also REPORT OF SENATE COMM. ON COMMERCE, S. REP. NO. 151, 93d Cong., 1st Sess. 27-29 (1973) (reporting bill with redress provision out of Commerce Committee).

223. See 119 CONG. REC. 29,479 (1973) (observing that major provisions of bill had passed Senate twice and on last occasion by vote of 76 to 2).

224. See REPORT OF HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, H.R. REP. NO. 1107, 93d Cong., 2d Sess. 44-53 (1974) (accompanying H.R. 7917). The principal objection in committee was that the Senate version, which the House bill copied, was construed to have permitted redress for conduct that violated an FTC cease and desist order although the person being sued had not been a party to, or had notice of, the order. *Id.* at 87. This would, in effect, make a cease and desist order tantamount to a substantive rule without providing procedural safeguards required in rulemaking proceedings. *Id.* The final version of the Magnuson-Moss Act gave the FTC the power only to bring penalty actions against persons knowingly engaged in activity that was ruled unfair or deceptive in a cease and desist order against another person. The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 205, 88 Stat. 2193, 2201 (1975) (adding Federal Trade Commission Act, § 5(m)(1)(B), 15 U.S.C. § 45(m)(1)(B) (1988)).

225. 120 CONG. REC. 31,734 (1974) (describing amendment offered by Rep. Eckhardt).

226. *Id.* The amendment read:

No action may be brought by the Commission under this section more than six years after the violation of the rule to which the action relates; except that if a cease and desist order with respect to a violation of a rule by any person has become final and such order was issued in a proceeding under subsection (b) which was commenced

provoked an objection that while FTC rule violations were being given a six-year period for redress, securities laws only gave a three-year period for actions based on securities fraud.²²⁷ The Eckhardt amendment was defeated²²⁸ and the bill passed the House without a redress provision.²²⁹

In the Conference Committee, the Senate prevailed and a consumer redress provision was included in the legislation.²³⁰ The Conference Committee version added section 19 to the FTC Act.²³¹ It addressed, among other things, the House's objections to the six-year statute of limitations and the possibility of a redress suit against someone who, at the time of the conduct at issue, was unaware of the legal violation. Thus, the provision allowed the FTC to sue in district court for consumer redress arising out of a respondent's violation of an FTC trade regulation rule²³² or a violation of the prohibitions of section 5 of the FTC Act against "unfair or deceptive acts or practices."²³³ In the latter type of case, however, a district court could award redress only with respect to activity that "a reasonable man would have known under the circumstances was dishonest or fraudulent."²³⁴ Furthermore, Congress imposed a three-year statute of limitations on all redress actions dating from the time of the injury-causing activity, regardless of whether it involved a trade regulation rule violation or an unfair or deceptive act or practice.²³⁵

The relief allowed by section 19 is limited only by the nature of

not later than six years after the violation occurred, a civil action may be commenced under this section against such person at any time before the expiration of one year after such order becomes final.

Id.

227. See *id.* at 31,736 (remarks of Rep. Young) (arguing that six-year statute of limitations would be twice as long as that provided for securities fraud actions).

228. *Id.* at 31,737 (listing vote as 180 in favor and 209 against, with 45 not voting).

229. *Id.* at 31,739-40 (reporting passage of H.R. 7917 by vote of 384 to 1). Representative Bingham noted, however, that the bill "falls short of giving the FTC the full range of legal powers which it must have if it is to protect consumers forcefully and efficiently." *Id.* at 31,739.

230. S. CONF. REP. NO. 1408, 93d Cong., 2d Sess. 20-21 (1974) (adding consumer redress provision and changing statute of limitations to three years).

231. Federal Trade Commission Act, § 19, 15 U.S.C. § 57b (1988).

232. *Id.* § 57b(a)(1).

233. *Id.* § 57b(a)(2).

234. *Id.* The provision reads: "If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b) of this section." *Id.*

235. Federal Trade Commission Act, § 19(d), 15 U.S.C. § 57b(d) (1988). Section 57b(d) states that "[n]o action may be brought . . . more than 3 years after the rule violation . . . or the unfair or deceptive act or practice" to which the action relates. If the FTC brings an administrative action within the three years, it may file for consumer redress in court within one year after the entry of a final cease and desist order. *Id.*

the act involved and the remedial power of the court. Congress contemplated both legal and equitable remedies. For instance, the Act lists as examples of remedies the rescission or reformation of contracts, the refund of money or the return of property, the payment of damages, and public notification of the violation.²³⁶ These remedies, however, are not exclusive. Congress also gave courts the authority "to grant such relief as the court finds necessary to redress injury to consumers or other[s]. . . ." ²³⁷ Both houses passed the conference version²³⁸ and the President signed it into law as the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act.²³⁹

As might be expected in such circumstances, section 19 as it emerged from Congress reflected compromises made during the legislative process. While these compromises placed the burdens of scienter and statute of limitations on the FTC, and while the result may not have entitled all injured consumers to redress under the new section 19, it was the scheme Congress fashioned.

Although Congress passed the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act over a year after passing the injunction provision as part of the Trans-Alaska Pipeline Act, it was well aware of that injunction provision when it considered the Magnuson-Moss consumer redress provision.²⁴⁰ There is nothing in the legislative history suggesting that members of Congress who debated the 1974 consumer redress provision understood the 1973 injunction legislation to have addressed the consumer redress issue. Furthermore, the legislative history does not support a congressional intent that section 13(b) relief provide consumer restitution in circumstances where section 19 would not.

Interpreting the injunction and consumer redress provisions together, the preliminary injunction provision may be construed, consistent with congressional intent, to also allow for the freezing of assets and entry of other relief necessary to preserve assets for con-

236. Federal Trade Commission Act, § 19(b), 15 U.S.C. § 57b(b) (1988).

237. *Id.*; see also REPORT OF SENATE COMM. ON COMMERCE, S. REP. NO. 151, 93d Cong., 1st Sess. 28 (1973) (accompanying S. 356).

238. See 120 CONG. REC. 40,725 (1974) (listing vote in Senate on S. 356 as 70 in favor, 5 against, with 25 not voting); *id.* 41,408 (accepting H.R. CONF. REP. NO. 1606) (1974).

239. Pub. L. No. 93-637, 88 Stat. 2183 (1975).

240. The awareness was brought home by the need to explain why the injunction provision adopted by the Senate in 1973 was no longer in the bill when the House came to vote on its version in 1974. See H.R. REP. NO. 1107, 93d Cong., 2d Sess. 34 (1974) (explaining inclusion of injunction provision in Trans-Alaska Pipeline Act); see also 120 CONG. REC. 41,407-08 (1974) (remarks of Sen. Broyhill) ("[The FTC Improvement Act] completes the FTC reform begun with the amendments to the Alaska pipeline bill, and these two bills together constitute an important new consumer protection measure for which we should all feel proud.").

sumer relief.²⁴¹ In the case of permanent injunctions, it is reasonable to argue that such an injunction can include consumer relief, but only if the criteria of section 19 are met. Congress would not have taken the trouble in section 19 to limit consumer relief in cases not involving trade regulation rule violations to those demonstrating fraudulent intent and filed within a three-year period if, only a year before, it had intended in section 13 to give the FTC the ability to ignore those limitations by invoking the courts' equitable injunction power.²⁴² However, the courts have construed this legislation to permit just such an evasion of the section 19 limits.²⁴³

III. THE JUDICIARY TAKES OVER

The FTC was slow to use the power it gained in 1973 to obtain injunctions. This was the subject of a critical General Accounting Office study in 1978, which motivated the FTC to become serious about exercising its new authority.²⁴⁴ Shortly thereafter, the FTC started using its section 13(b) injunction power frequently in routine fraud cases. Because of the precedent established in those cases allowing consumer redress in connection with injunctions, resort to the section 19 consumer redress provision has become a less attractive option for the FTC and has languished.²⁴⁵

A. *Judicial Construction of the Section 13(b) Preliminary Injunction Authority in Consumer Protection Cases*

Section 13(b) of the FTC Act gives the FTC power to seek prelim-

241. See *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1112 (9th Cir. 1982) (allowing asset freezes and preliminary enjoining of conduct).

242. There is no legislative history from which such an intention can be inferred. In addition, neither the FTC nor the trade regulation bar evidenced an understanding after passage of section 19 that the FTC already had the ability to obtain consumer redress under section 13(b). In presentations following passage of the Magnuson-Moss legislation, the Commission's chairman, its deputy general counsel, and private practitioners made no mention of consumer redress under section 13. See Hon. Lewis A. Engman, *Report From the Federal Trade Commission*, 44 ANTITRUST L.J. 161, 164 (1975) (stating that "[w]ith respect to consumer redress, Congress has created a wholly new approach capable of tremendous flexibility" in Magnuson-Moss Act); Panel Discussion, *Emerging Issues Under the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act: Part II—FTC Improvement Act*, 45 ANTITRUST L.J. 96, 100-02 (1976) (discussing consumer redress, but making no mention of section 13(b)).

243. See *FTC v. Southwest Sunsites, Inc.*, 655 F.2d 711, 718 (5th Cir. 1982) (holding grant of jurisdiction in section 13(b) includes authorization to exercise full range of equitable remedies traditionally available), *cert. denied*, 456 U.S. 973 (1982); *FTC v. H.N. Singer, Inc.*, 688 F.2d 1107, 1113 (9th Cir. 1982) (deciding that Congress in § 19 did not intend to restrict broad equitable jurisdiction granted to district court by § 13(b)).

244. U.S. GENERAL ACCOUNTING OFFICE, VICTIMS OF UNFAIR BUSINESS PRACTICES GET LIMITED HELP FROM THE FEDERAL TRADE COMMISSION, 23-24 (1978).

245. See John H. Carley, *FTC Muscle Evident in Its Settlements*, LEGAL TIMES, Nov. 7, 1983, at 11 (noting that while section 19 is procedurally cumbersome and causes delay, section 13(b) allows consumer recovery in unified district court action).

inary injunctions and, in "proper cases," permanent injunctions.²⁴⁶ The language containing the preliminary injunction authority speaks only of the FTC seeking and the court granting "a temporary restraining order or a preliminary injunction" to remain in effect until the conclusion of the FTC's administrative proceeding.²⁴⁷ An early interpretational issue for courts construing this language was whether such an order could include a freeze of a respondent's assets. In *FTC v. Southwest Sunsites, Inc.*,²⁴⁸ the Fifth Circuit answered this question in the affirmative. It concluded that such relief was necessary to ensure the payment of consumer redress at the conclusion of a section 19 consumer redress action, authorized in the 1975 Magnuson-Moss legislation.²⁴⁹ Addressing the preliminary injunction provision and the consumer redress provision together, the court concluded that "Congress was evolving a statutory plan for the protection of the . . . public."²⁵⁰ The court added that if the preliminary freezing of assets was not permitted, the consumer redress provision could be nullified and the purpose of Congress' "plan" frustrated.²⁵¹

In reaching its conclusion, the Fifth Circuit relied on two Supreme Court decisions allowing expansive construction of a statutory invocation of the courts' equitable powers.²⁵² In *Porter v.*

246. Federal Trade Commission Act, § 13(b), 15 U.S.C. § 53(b)(1)-(2) (1988). Section 13(b) reads:

Whenever the Commission has reason to believe-

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public-

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided, however,* That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further,* That in *proper cases* the Commission may seek, and after *proper proof*, the court may issue, a permanent injunction. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

Id. (emphasis added).

247. See *supra* note 196 (quoting statutory language).

248. 665 F.2d 711 (5th Cir.), *cert. denied*, 456 U.S. 973 (1982).

249. *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 720-21 (5th Cir.), *cert. denied*, 456 U.S. 973 (1982).

250. *Id.* at 720 (quoting *SEC v. Keller Corp.*, 323 F.2d 397, 403 (7th Cir. 1963)).

251. *Id.*

252. *Id.* at 717-18.

Warner Holding Co.,²⁵³ the Court dealt with a World War II statute that authorized the Administrator of the Office of Price Administration to apply for a court order "enjoining" activity that violated the Emergency Price Control Act, or for an "order enforcing compliance" with that Act.²⁵⁴ This Act authorized courts to enter "a permanent or temporary injunction, restraining order, or other order."²⁵⁵ The Supreme Court held that this judicial authority included the right to order the payment of restitution to those charged real estate rentals above the maximum price level allowed under the Emergency Price Control Act.²⁵⁶ The Supreme Court concluded that "[u]nless a statute in so many words, or by necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. . . . Only in that way can equity do complete rather than truncated justice."²⁵⁷

Although the Court made a perfunctory bow to congressional intent, the polestar in the construction of any statute,²⁵⁸ it displayed reverence for the broad powers of equity.²⁵⁹ "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction."²⁶⁰ Other than referencing "the great principles of equity," the Court failed to explain why legislative intent should take a back seat when Congress invokes an equitable power, regardless of how venerable. This oversight is particularly grave in the legislative sphere where invocation of equity may be part of a larger remedial statutory scheme and where the concept of an "injunction" is unlikely to carry with it in the minds of legislators all the additional accoutrements of equity. The Court's construction of a presumption in favor of a full grant of equity power when the statute invokes one aspect of that power constitutes a dubious—indeed, arrogant—assertion of judicial authority.²⁶¹ Although the Court found "truncated justice" dis-

253. 328 U.S. 395 (1946).

254. *Porter v. Warner Holding Co.*, 328 U.S. 395, 399 (1946).

255. *Id.* at 397.

256. *Id.* at 402-03.

257. *Id.* at 398.

258. See *Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co.*, 111 S. Ct. 1227, 1231 (1991) (refusing to apply Title VII of Civil Rights Act of 1964 overseas because statute lacked "affirmative congressional intent" to do so).

259. *Porter*, 328 U.S. at 398.

260. *Id.* (quoting *Brown v. Swann*, 35 U.S. (10 Pet.) 496, 503 (1836)).

261. This is particularly true with regard to section 13(b) injunction authority that was inserted as a last minute floor amendment to a large and complicated bill on another matter. See *supra* note 198 (discussing procedural short-cut used to pass FTC Act amendment); cf. REPORT OF HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE ON H.R. 7917, H.R. REP. NO. 1107, 93d Cong., 2d Sess. 84 (1974) (relating separate views reporting objection raised at

tasteful,²⁶² it is the intent of the legislative branch that should govern the interpretation of a statutorily created remedy, not the sensitivities of the judiciary.²⁶³

The *Porter* case was followed fifteen years later in *Mitchell v. Robert DeMario Jewelry, Inc.*²⁶⁴ That case construed the Fair Labor Standards Act provision giving district courts the power to restrain violations of the Act.²⁶⁵ The defendant, DeMario, fired employees in retaliation for their part in persuading the Department of Labor to file an action against DeMario for unpaid wages.²⁶⁶ The Department of Labor brought a second action seeking an injunction prohibiting such retaliatory firing and requesting reinstatement of the employees and payment of wages lost due to the firing.²⁶⁷ The district court granted the injunction and the court of appeals affirmed.²⁶⁸ The court of appeals, however, held that the district court did not have the power, ancillary to its injunction power, to order the payment of lost wages.²⁶⁹ The court of appeals stated that such authority had to be expressed in the statute or implied from the congressional enactment.²⁷⁰

The Supreme Court disagreed with the court of appeals' statement of the criterion. Refusing to distinguish *Porter* on its facts,²⁷¹ the Court followed *Porter* and ruled that "[w]hen Congress entrusts

time to including FTC Act amendments in Alaska pipeline legislation and referring to new House rule adopted to address "this type of mischief").

262. *Porter*, 328 U.S. at 398.

263. The statutory scheme in *Porter v. Warner Holding Co.* allowed for private actions to recover damages arising from overcharges for a limited period after the overcharge occurred. *Id.* at 397. Thereafter, the Act authorized the Administrator to sue for damages in the public interest if private actions had not been brought. *Id.* at 401. The proceeds of such actions would be paid into the U.S. Treasury. *Id.* at 402. This scheme notwithstanding, the Court also found an inherent equitable power to grant restitution to individuals who were overcharged when the Administrator sought the Court's exercise of its equitable power to restrain conduct that violated the Price Control Act. *Id.* at 403. The Court found no conflict between the explicit statutory scheme for the recovery of "damages" and the implied equitable power to order "restitution" in connection with the entry of an injunction. *Id.* at 397-403.

264. 361 U.S. 288 (1960).

265. *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 289-90 (1960).

266. *Id.* at 290.

267. *Id.*

268. *Id.*

269. *Mitchell v. Robert DeMario Jewelry, Inc.*, 260 F.2d 929, 934 (5th Cir. 1958), *rev'd*, 361 U.S. 288 (1960). The district court had not decided the jurisdictional question because it had declined to award lost wages as a matter of discretion. *See Mitchell v. Robert DeMario Jewelry, Inc.*, 180 F. Supp. 800, 800 (M.D. Ga. 1957) (granting injunction against discrimination and ordering reinstatement of discharged employees), *aff'd*, 260 F.2d 929 (5th Cir. 1958), *rev'd*, 361 U.S. 288 (1960).

270. *DeMario*, 260 F.2d at 933.

271. *DeMario*, 361 U.S. at 291. The Court refused to look on *Porter* as a "wartime statute" that may have gone further than is appropriate for a peacetime environment, or to view the statutory language in *Porter* permitting the court to enter "other orders" as the basis on which that case rested. *Id.*

to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes."²⁷² In other words, whenever Congress looks to the injunctive power of the courts, it must be presumed that it intended to bestow on the courts the power to invoke the full panoply of equitable relief unless Congress specifically disclaims such an intent.

Following this Supreme Court precedent, the Fifth Circuit held in *FTC v. Southwest Sunsites, Inc.*²⁷³ that the 1973 amendment of the FTC Act, giving courts the power to enter a preliminary injunction on an FTC petition, includes the right to freeze a respondent's assets.²⁷⁴ The Fifth Circuit reasoned that this protects the possibility of restitutionary relief that could be sought by the FTC pursuant to its new section 19 authority after a successful administrative prosecution of the respondent.²⁷⁵ In light of the Supreme Court precedent, such a conclusion is unexceptionable because it is appropriate and supportive of the statutory purpose of the FTC Act.²⁷⁶

Disregarding for the moment the power of the courts to enter permanent injunctions for the FTC in "proper cases," the preservation of assets for the entry of an order at the conclusion of a section 19 redress proceeding is in accord with the purposes of the amended FTC Act. Such an action, in fact, would be a logical component of implied congressional intent in the Trans-Alaska Pipeline amendment. To hold that the court did not have such power would have substantially undermined the effectiveness of the redress provision, in much the same way that failure to allow payment of restitution for wages lost due to a retaliatory discharge would have nullified the policy of the Fair Labor Standards Act involved in *DeMario* to encourage individuals to complain of violations of the Act. Unless a freeze order to preserve assets is allowed, an order requiring redress following an administrative proceeding could be ineffective because the assets could be dissipated or otherwise transferred in the interim.

272. *Id.* at 291-92. In so holding, the Court was not persuaded that a proviso in the injunctive power section prohibiting a court from awarding "unpaid minimum wages or unpaid overtime compensation" applied as well to the award of wages lost because of a retaliatory firing in violation of the Act. *Id.* at 294-95.

273. 665 F.2d 711 (5th Cir.), *cert. denied*, 456 U.S. 973 (1982).

274. *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 718 (5th Cir.), *cert. denied*, 456 U.S. 973 (1982).

275. *Id.* at 719-20.

276. *Id.*

*B. Judicial Construction of the Section 13(b) Permanent Injunction
Authority: A Judicial Bypass of Section 19*

With this precedent set, however, courts blindly took the next step to conclude that the authority to issue permanent injunctions, as well as preliminary injunctions, includes the power to grant restitutionary relief outside section 19's established statutory procedures and criteria. The first case to consider this issue, and the one that set the precedent for the cases that followed, was the Ninth Circuit's decision in *FTC v. H.N. Singer, Inc.*²⁷⁷ In *Singer*, the district court issued a preliminary injunction that included an order freezing the defendants' assets to preserve the possibility of restitution to those defrauded by the defendants' actions.²⁷⁸ The Ninth Circuit upheld the freeze order as ancillary to an injunction to keep the possibility of a section 19 redress proceeding available.²⁷⁹ The court then proceeded to address the question of whether the freeze order could be entered to protect the right of the court, acting pursuant to its own authority in equity, to grant restitution as part of a permanent injunction entered in a "proper case" pursuant to section 13(b).²⁸⁰ Such relief would not be constrained by the intent and

277. 668 F.2d 1107 (9th Cir. 1982); *accord* *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314-15 (8th Cir. 1991) (granting monetary equivalent of rescission as part of ancillary equitable relief); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571 (7th Cir.) (allowing rescission and restitution in monetary relief), *cert. denied*, 493 U.S. 954 (1989); *FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1088 (9th Cir. 1985) (holding that preliminary asset freezing is appropriate to protect court's permanent injunction authority to order restitution); *FTC v. United States Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11th Cir. 1984) (allowing preliminary freezing of assets and appointing of receiver to protect court's ability to order permanent injunction); *FTC v. Atlantex Assocs.*, 1987-2 Trade Cas. (CCH) ¶ 67,788, at 59,254-55 (S.D. Fla. 1987) (giving monetary restitution), *aff'd*, 872 F.2d 966 (11th Cir. 1989); *FTC v. Solar Michigan, Inc.*, 1988-2 Trade Cas. (CCH) ¶ 68,339, at 59,919 (E.D. Minn. 1988) (finding asset freeze necessary to protect ability to order consumer redress); *Evans Prods. Co.*, 1986-1 Trade Cas. (CCH) ¶ 67,113, at 62,725 (S.D. Fla. 1986) (holding that courts may order restitution even if violations have stopped and are not likely to recur); *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1298 (D. Minn. 1985) (ordering permanent injunction granting consumer redress); *FTC v. International Diamond Corp.*, 1983-2 Trade Cas. (CCH) ¶ 65,506, at 68,457 (N.D. Cal. 1983) (concurring with *Singer*).

278. *FTC v. H.N. Singer, Inc.*, 1982-83 Trade Cas. (CCH) ¶ 65,011, at 70,611 (N.D. Cal. 1982).

279. *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1112 (9th Cir. 1982).

280. The FTC has suggested that a "proper case" is one in which the applicable rule of law is clear enough that the court can rely readily on prior precedent or express statutory authority in determining the meaning of "unfair or deceptive" in the circumstances of the case. *FTC v. H.N. Singer, Inc.*, 1982-83 Trade Cas. (CCH) ¶ 65,011 at 70,618 (N.D. Cal. 1982). Some courts prefer to consider a case "proper" when it is a "routine fraud case" or one that involves "garden variety fraudulent acts and practices." See *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1028 (7th Cir. 1988) (holding FTC has authority to seek injunctive relief in routine fraud cases); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1111 (9th Cir. 1982) (holding that "routine fraud case is a proper case"); *FTC v. International Diamond Corp.*, 1983-2 Trade Cas. (CCH) ¶ 65,725, at 69,706 (N.D. Cal. 1983) (noting legislative history supports idea that Congress intended section 13(b) to be limited to "garden variety fraudulent acts"). Courts have also held section 13(b) to authorize permanent injunc-

statute of limitations prerequisites for section 19 consumer restitution.²⁸¹

In concluding that the district court had the power to order restitution in connection with its equitable power to grant permanent injunctions, the Ninth Circuit quoted *Porter v. Warner Holding Co.*, which held that once any aspect of the equitable power of the courts is invoked, the full range of equitable relief is presumed.²⁸² Whether or not one agrees with the *Porter/DeMario* doctrine,²⁸³ its application requires that two criteria be met. First, the payment of restitution must further the "policy of the act."²⁸⁴ Second, the statutory scheme must not contain "by a necessary or inescapable inference" a restriction on the exercise of such authority.²⁸⁵ The courts have ignored these limitations on the *Porter/DeMario* doctrine by permitting the award of restitutionary relief in section 13(b) permanent injunction cases without regard for the prerequisites for such relief in section 19.²⁸⁶ This circumvention of section 19 defies the

tions against acts that violate a statute for which the FTC has enforcement responsibility or an FTC trade regulation rule. See *FTC v. Virginia Homes Mfg. Corp.*, 509 F. Supp. 51, 54 (D. Md.) (noting section 13(b) applies to violations of any provisions of law enforced by FTC), *aff'd without pub. opinion*, 661 F.2d 920 (4th Cir. 1981); see also *JS & A Group Inc. v. FTC*, 716 F.2d 451, 455 (7th Cir. 1983) (allowing FTC to grant permanent injunction for defendant's violation of FTC's Mail Order Rule).

281. *Cf. FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1315 (8th Cir. 1991) (asserting there can be "no inference that Congress intended section 19 to restrict broad equitable jurisdiction granted to district court by section 13(b)"); *FTC v. Virginia Homes Mfg. Corp.*, 509 F. Supp. 51, 55 (D. Md.) ("It is the authority of the courts rather than the authority of the Commission which is at issue."), *aff'd without pub. opinion*, 661 F.2d 920 (4th Cir. 1981).

282. *H.N. Singer*, 668 F.2d at 1112 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)). Even the FTC appeared surprised at the favorable turn of events, as evidenced by its general counsel referring to it as "the most striking development in Section 13(b) law in recent years." See Paul, *supra* note 199, at 142, 145 (stating that FTC was "beneficiary of this principle of statutory interpretation").

283. See notes 253-72 and accompanying text (explaining *Porter/DeMario* doctrine). The reasoning of the two cases is not persuasive. See *supra* text accompanying notes 253-83. The precedent exists, however, and is a longstanding means of statutory interpretation. See, e.g., *California v. American Stores Co.*, 495 U.S. 271, 295 (1990) (holding "injunctive relief" available to private antitrust plaintiffs includes divestiture of illegally acquired competitor); *Commodity Futures Trading Comm'n v. CoPetro Mktg. Group, Inc.*, 680 F.2d 573, 583-84 (9th Cir. 1982) (refusing to deny "inherent equitable powers of a court to afford complete relief"); *ICC v. B & T Transp. Co.*, 613 F.2d 1182, 1184-85 (1st Cir. 1980) (applying *Porter* to allow ICC to seek restitution); *Commodity Futures Trading Comm'n v. Hunt*, 591 F.2d 1211, 1223 (7th Cir.) (concluding district court has authority to order restitution pursuant to Commodity Exchange Act), *cert. denied*, 442 U.S. 921 (1979); *SEC v. Bangor Punta Corp.*, 480 F.2d 341, 390 (2d Cir.) (relying on *DeMario* to allow SEC to seek ancillary relief), *cert. denied*, 414 U.S. 924 (1973); *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1103 (2d Cir. 1972) (confering power to district courts to fashion "appropriate remedies" in cases involving securities laws); *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1307 (2d Cir.) (citing *DeMario* to uphold power of Government to seek restitution without specific statutory authority), *cert. denied*, 404 U.S. 1005 (1971). Thus, it is unlikely the Supreme Court will overrule the precedent established in *Porter* and *DeMario*.

284. *DeMario*, 361 U.S. at 291-92; *Porter*, 328 U.S. at 400.

285. *Porter*, 328 U.S. at 398.

286. See *infra* note 292 and accompanying text (listing section 19 prerequisites).

policy of the FTC Act to provide restitution while providing "protection against unfairness" negotiated in Congress.²⁸⁷ Consequently, the interpretation flies in the face of a "necessary and inescapable inference" that permanent injunction authority is constrained, when granting restitution, by the criteria set forth in section 19.

Section 19 embodies the FTC Act's policy regarding the provision of restitutionary relief and sets out requirements for such relief.²⁸⁸ It requires that the FTC meet three criteria as a predicate for obtaining any restitutionary recovery for deceptive conduct outside the proscription of a trade regulation rule.²⁸⁹ These criteria are: (1) the FTC must have issued a final cease and desist order against the respondent prohibiting an unfair or deceptive act or practice;²⁹⁰ (2) the conduct subject to that order must have been of a nature "that a reasonable man would have known under the circumstances was dishonest or fraudulent;"²⁹¹ and (3) the act or practice for which restitution is ordered must not have occurred more than three years prior to commencement of the action.²⁹²

Finding a separate unrestricted restitutionary procedure under section 13(b) all but nullifies the statute of limitations and intent element required by Congress.²⁹³ To use the Supreme Court's language in *Porter*, the finding that section 13(b) permits an unrestricted means of restitution creates such a conflict with section 19 that an "inescapable inference" arises that the power to grant permanent injunctions under section 13(b) does not include the power to grant redress to consumers injured by the conduct giving rise to the injunction when the requirements of section 19 have not been

287. See 120 CONG. REC. 41,407 (1973) (remarks of Rep. Broyhill) (urging passage of conference report on Magnuson-Moss Warranty—Federal Trade Commission Improvement Act despite inclusion of consumer redress section that he and majority of House opposed during House consideration of bill); *supra* notes 222-31 and accompanying text (discussing negotiations and compromise that occurred during passage of bill).

288. Federal Trade Commission Act, §§ 19(a)(1)-(2), (d), 15 U.S.C. §§ 57b(a)(1)-(2), (d) (1988).

289. *Id.*

290. The provision has been construed to apply to conduct taking place before the entry of the order. See *FTC v. Glenn W. Turner Enters., Inc.*, 446 F. Supp. 1113, 1114-15 (M.D. Fla. 1978) (construing these criteria to apply even though practice may not have been repeated or continued in violation of order).

291. Federal Trade Commission Act, § 19(a)(2), 15 U.S.C. § 57b(a)(2) (1988).

292. *Id.* § 19(d), 15 U.S.C. § 57b(d). If the FTC files its own administrative complaint within the three-year period, it may seek restitution under section 19 at any time up to one year after entry of a final order against the respondent. *Id.*

293. This has a profound effect on the type of action the FTC decides to file to enforce the FTC Act. It also gives the FTC enormous leverage in negotiating consent orders with redress provisions.

satisfied.²⁹⁴ The same Congress that passed section 13(b) demonstrated that it knew how to invoke equitable jurisdiction when it wanted and did so in great detail in section 19.²⁹⁵ The necessary implication is that what Congress did so specifically in one section, it would not have left for implication in another.²⁹⁶

In what appears to be a botched effort, the court in *Singer* attempted to deal with the argument that granting restitutionary relief pursuant to section 13(b) might be inconsistent with the section 19 relief.²⁹⁷ The court relied on the language of section 19(e) that the section 19(a)(2) restitutionary remedy is "in addition to and not in lieu of, any other remedy or right of action provided by State or

294. *Porter*, 328 U.S. at 398 (referring to Emergency Price Control Act and stating that "unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."); *cf. Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."). The conclusory assertion of the Ninth Circuit in *Singer* that "there is no necessary or inescapable inference, or, indeed, any inference, that Congress intended to restrict the broad equitable jurisdiction apparently granted to the court by section 13(b)" did not come as a result of any analysis of § 13(b) as it relates to the rest of the Act. *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982). A "holistic" analysis would have led to a contrary conclusion. *Cf. United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor."); *FTC v. University Health, Inc.*, 938 F.2d 1206, 1216 (11th Cir. 1991) ("[I]n interpreting one section of a statute, it is usually best to refer first to the overall statutory scheme of which the section is a part before turning to other sources . . ."); Kenneth W. Starr, *Of Forests and Trees: Structuralism in the Interpretation of Statutes*, 56 GEO. WASH. L. REV. 703, 706 (1988) (noting trend toward studying statutes in their entirety).

295. In spelling out the courts' powers with respect to requests for restitution under section 19, the Act states:

The court in an action under subsection (a) of this section shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

Federal Trade Commission Act, § 19(b), 15 U.S.C. § 57b(b) (1988).

296. See *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979) (explaining that "what must ultimately be determined is whether Congress intended to create the . . . remedy asserted").

297. *H.N. Singer*, 688 F.2d at 1113. Either the court misstated defendant's argument or the defendant missed the argument. According to the court:

Appellants argue that Congress in § 19 explicitly granted the district court power to award rescission and other forms of redress only when a Commission rule had been violated, and thus implicitly restricted the remedy for other violations of the Act to agency processes and to the injunctive relief provided by § 13(b).

Id. Section 19(a)(2) is clear, however, that it also applies to violations of the FTC Act when the person knew or should have known that the conduct was deceptive or fraudulent. 15 U.S.C. § 57b(a)(2) (1988).

Federal law.”²⁹⁸ That provision, however, is not support for the existence of section 13(b) equitable restitutionary relief. At best, it only allows other forms of relief if their separate existence can be established. That evidence does not exist to support the judicial interpretations of section 13(b) finding unrestricted restitutionary authority included in the power of district courts to order permanent injunctions in “proper cases.”²⁹⁹

Many respondents, particularly those that may be subject to restitutionary orders, are not nice people and have engaged in conduct that may run afoul of other criminal or civil mandates. Congress did not mean to preempt other forms of relief for those violations by passage of section 19. The Conference Report explained the purpose for inserting section 19(e) into the legislation: “It is not the intention of the conferees that private actions for redress based on the acts or practices which are the subject of a Commission consumer redress action be barred by a Commission action.”³⁰⁰ In addition, the conferees did not want to foreclose to the FTC civil penalty actions under other provisions of its enabling act.³⁰¹ The language of section 19(e), however, should not be used to nullify congressional intent within the FTC Act itself. Section 19 relief was, by its own language, “in addition to” other forms of relief.³⁰² That phrase would not have been used if Congress believed it was creating a right more restrictive than another already given in section 13. At the time that Congress adopted section 19, there was no construction of section 13, either legislative or judicial, that would have led Congress to understand that it was adding a limited consumer remedy to a statute that already permitted an unlimited one in section 13(b).

Another objective for inclusion of section 19(e) is suggested by the Conference Report’s explanation that “[t]he Commission may have [power] to itself issue orders designed [for] remedying violations of the law. That issue is now before the courts. It is not the

298. Federal Trade Commission Act, § 19(e), 15 U.S.C. § 57b(e) (1988); *see also* *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1315 (8th Cir. 1991) (concluding consumer redress under section 19 does not restrict redress under section 13(b)); *FTC v. International Diamond Corp.*, 1983-2 Trade Cas. (CCH) ¶ 65,506, at 68,457 (N.D. Cal. 1983) (finding section 19 does not preclude section 13(b) consumer redress).

299. *See supra* note 280 and accompanying text (discussing court’s view of “proper cases”).

300. H.R. CONF. REP. NO. 1606, 93d Cong., 2d Sess. 41 (1974); *see also* REPORT OF SENATE COMM. ON COMMERCE, S. REP. NO. 151, 93d Cong., 1st Sess. 28 (1973) (accompanying S. 356) (stating that redress provision “does not in any way purport to supplant private actions by consumers”).

301. H.R. CONF. REP. NO. 1606, 93d Cong., 2d Sess. 41 (1974).

302. Federal Trade Commission Act, § 19(e), 15 U.S.C. § 57b(e) (1988).

intent of the Conferees to influence the outcome in any way."³⁰³ Thus, section 19(e) preserved for the FTC its litigation position in the then-pending *Heater* case.³⁰⁴ It does not constitute authority for an expansive reading of section 13(b) that all but nullifies specific statutory restraints that Congress imposed on section 19 relief.³⁰⁵

It is true that *Porter* and *DeMario* involved statutes that set forth types of private and public relief provisions.³⁰⁶ That did not prevent the Supreme Court from also allowing equitable restitutionary relief as part of the entry of an injunction. The statutes in each of those two cases, however, differ in material respects from the amended FTC Act. In *Porter*, the Emergency Price Control Act allowed private suits for overcharges if brought within thirty days from the date of the violation.³⁰⁷ The Emergency Price Control Act then contemplated that if private relief was not sought, the Administrator could sue for damages that would be paid into the public treasury.³⁰⁸ The Court did not find a conflict in permitting restitution in connection with an injunction because it supplemented either private or public suits for "damages," which the Court distin-

303. H.R. CONF. REP. NO. 1606, 93d Cong., 2d Sess. 42 (1974).

304. *Heater v. FTC*, 503 F.2d 321, 326 (9th Cir. 1974); see Gerald P. Norton, *Emerging Issues Under the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act: Part II—FTC Improvement Act*, 45 ANTITRUST L.J. 97, 102 (1976) (arguing that section 19 does not alter FTC's authority as it stood before Magnuson-Moss amendment).

305. It may be argued that section 19 and section 13 are mutually exclusive. Section 13 applies to relief for "routine fraud" cases prosecuted by the FTC in the courts by seeking an injunction and section 19 redress applies when the FTC must exercise its definitional role under section 5 by prosecuting through its own administrative proceeding. There is no legislative history, however, supporting such a construction, nor is there an adequate explanation of why a consumer's ability to recover monies extracted from him or her by fraud or deception should in some cases turn on the enforcement mechanism selected by the FTC. For instance, a case instituted more than three years from the date of the deception can result in restitution for consumers only if the FTC decides to proceed by seeking a court injunction rather than by entering its own cease and desist order. That is not a distinction that has any basis in the legislative histories of either the Trans-Alaska Pipeline Act or the Magnuson-Moss legislation.

If Congress had specified the permanent injunctions for cases in which the practice had already been categorized as deceptive, and administrative proceedings only for fact situations that require the definitional role of the FTC, then providing for unlimited redress in the former but limiting section 19 redress in the latter might be consistent, at least for the imposition of the scienter requirement in the latter. Section 19(a)(1), however, contemplates FTC proceedings in clear-cut trade regulation rule violations. Additionally, a statute of limitations difference between section 13(b) and section 19(a) is not logical. In any event, Congress evidenced no intention to create such a scheme. Judicial attempts to do so usurp the Article I legislative function. Cf. Hon. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947) ("[N]o one will gainsay that the function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature.").

306. *Porter v. Warner Holding Co.*, 328 U.S. 395, 401 (1946); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 293-94 (1960).

307. *Porter*, 328 U.S. at 401.

308. *Id.* at 402.

guished from equitable restitution.³⁰⁹ Thus, the Court found the relief supplementary to, rather than in conflict with, that relief.³¹⁰ In the FTC Act, however, the courts have found an implied restitution remedy in section 13(b) that is inconsistent with a restitution right explicitly granted, with limitations, by section 19.

Also in contrast to the FTC Act, the Fair Labor Standards Act as explained in *DeMario* encouraged private individuals to complain about infractions of the Act.³¹¹ To prohibit payment of lost wages after a retaliatory firing would have severely interfered with the policy of promoting complaints. Workers would be reluctant to complain, fearing they would sacrifice current wages to recover unpaid amounts from the past.³¹² That type of situation does not exist under the FTC Act, because section 19 of the Act already provides restitutionary relief. The additional equitable relief is completely coextensive with that relief and, in part, inconsistent with it. The specific grant of relief, with its restraints, should take precedence over a power that is only presumed whenever the court is given equitable authority to enter injunctions.

*C. Reconciling Section 13(b) Permanent Injunctions with Section 19
Consumer Redress*

Given the *Porter/DeMario* doctrine that a statutory grant of injunction power to the courts calls into play all equitable remedies to do complete justice "in light of the statutory purposes,"³¹³ and considering that Congress in section 19 explicitly restricted restitutionary relief available to the FTC with a statute of limitations and a scienter prerequisite,³¹⁴ the reconciliation of this situation is self-evident. Section 13(b) permanent relief, by its own terms, is limited to "proper cases" and is authorized "after proper proof."³¹⁵ A proper case and proper proof is established, for purposes of granting restitutionary relief, when the FTC satisfies the requirements of section 19. Thus, in cases of a trade regulation rule violation, the FTC would establish a "proper case" and "proper proof" for restitution under section 13(b) ancillary to a permanent injunction if the requirement of section 19, that the FTC seek restitution in court

309. *Id.* at 402-03.

310. *Id.* at 402. The Court noted that there was no legislative history showing that Congress intended to "whittle down the equitable jurisdiction recognized by § 205(a) so as to preclude a suit for restitution." *Id.* at 403 n.5.

311. *DeMario*, 361 U.S. at 289-91.

312. *Id.* at 292-93 (calling this "Hobson's choice").

313. *Porter*, 328 U.S. at 400; *DeMario*, 361 U.S. at 292.

314. Federal Trade Commission Act, § 19, 15 U.S.C. § 57b (1988).

315. See *supra* note 196 (providing text of section 13(b)).

within three years of the occurrence of the conduct violating the rule, is met.³¹⁶

When considering an unfair or deceptive act or practice outside FTC trade regulation rule violations, section 19 imposes the further requirement that the FTC establish that the conduct was such that "a reasonable man would have known under the circumstances was dishonest or fraudulent."³¹⁷ This should not cause the FTC undue hardship because the actions that it tends to file for section 13(b) permanent relief typically involve hard-core dishonesty or fraud.³¹⁸

The third requirement of section 19 is that the request for restitution follow an FTC cease and desist order directed at such practices. This requirement can be dispensed with because both section 13(b) and section 19 contemplate that a district court will conduct the same inquiry. Likewise, a permanent injunction will follow a court finding that the conduct under scrutiny constituted an unfair or deceptive act or practice. Forsaking a separate administrative proceeding for that purpose fulfills the legislative objective of expedition and efficiency that underlies section 13(b).³¹⁹

The reconciliation of section 19 and section 13(b) is neither tortured nor difficult and does not impose undue burdens on the FTC. The most difficult aspect is the statute of limitations. FTC investigations are not speedy once commenced, and usually there is considerable delay before a course of conduct becomes so serious that it induces the FTC to begin an investigation. It is likely, therefore, that the three-year statute of limitations may have passed on much of the conduct that forms the evidentiary basis for a permanent injunction. This is not an insurmountable problem, but requires the FTC to develop tighter control over the conduct of its consumer protection investigations and to be more responsive when fraudulent practices are brought to its attention. The three-year limit is

316. The FTC has not been consistent in the application of a three-year statute of limitations in section 13(b) permanent injunctions cases. Perhaps for strategic purposes, it has occasionally acquiesced to application of the section 19 criteria in such cases. See *FTC v. National Business Consultants, Inc.*, 1991-2 Trade Cas. (CCH) ¶ 69,631, at 66,828 n.30 (E.D. La. 1991) ("The statutory limit for obtaining redress under Section 19(b) of the FTC Act is three years. Section 13(b) contains no such limitation, however, the FTC has not suggested extending redress beyond that three year period.").

317. Federal Trade Commission Act, § 19(a)(2), 15 U.S.C. § 57(b)(a)(2) (1988).

318. See, e.g., *FTC v. Sharp*, 1991-2 Trade Cas. (CCH) ¶ 69,579, at 66,552 (D. Nev. 1991) (applying scienter requirement of section 19 in section 13(b) case); *FTC v. Magui Publishers, Inc.*, 1991-1 Trade Cas. (CCH) ¶ 69,391, at 69,425 (C.D. Cal. 1991) (imposing final judgment based on Findings of Fact and Conclusions of Law proposed by FTC).

319. REPORT OF THE SENATE COMM. ON COMMERCE, S. REP. NO. 151 93d Cong., 1st Sess. 31 (1973) (accompanying S. 356) (observing that injunction provision allows FTC to better utilize its resources and dispose of cases more efficiently).

also an issue the FTC may wish to bring to the attention of Congress for future legislative action.

Already, the FTC has become sensitive to the passage of time. For instance, it is now standard operating procedure that when the FTC staff believes that the restitution statute of limitations is in danger of running on unfair or deceptive conduct before an investigation is complete, the FTC staff requests a waiver of the statute of limitations from the investigated company until the investigation is completed.³²⁰ If the company refuses, the alternative is to file an action administratively or in court before concluding the investigation. Most potential respondents agree to a waiver, hoping that they will be able to persuade the FTC not to bring a case at all or to allow more time for the negotiation of a consent agreement.

CONCLUSION

Under our constitutional system, all legislative powers are vested in Congress. The expansive judicial interpretation of section 13(b) permanent injunction power improperly invades the legislative domain. With minor adjustment, however, the judiciary can honor congressional intent while achieving a just result for the benefit of most consumers injured by the dishonest or fraudulent practices of unethical businesses. If the current limitations of section 19 are not satisfactory, the proper place to seek relief is in Congress rather than in the courts.

320. FTC OPERATING MANUAL § 11.3.1.4 (1988).

